Welcome to the Bar Exam Toolbox podcast. Today, we are doing another in our “Listen and Learn” series – this one is on anticipatory repudiation. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl’s Guide to Law School. If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the Law School Toolbox podcast. If you have any questions, don’t hesitate to reach out to us. You can reach us via the contact form on BarExamToolbox.com, and we’d love to hear from you. And with that, let’s get started.

Hello, and welcome back to the “Listen and Learn” series from the Bar Exam Toolbox podcast! Today we are going to be talking about anticipatory repudiation, which is an often-tested issue in both the MBE and on Contracts essays. Anticipatory repudiation can be a bit tricky because it turns the typical order of operations on its head. When many students think about a breach of contract case, they think about Party A suing Party B because Party B has already failed to perform under the contract. For example, if Peter Painter promises to paint Holly Homeowner’s house on January 1, Holly Homeowner usually has to wait until January 2 to bring an action for breach of contract. Until that time, there usually has been no breach, because Peter can still perform.

But what happens if, on November 15, Peter tells Holly that he double-booked himself on January 1 and will not be able to paint her house as promised? That’s where the issue of anticipatory repudiation comes into play. As the name implies, anticipatory repudiation is the repudiation – or breach – of a contract in anticipation of performance becoming due. Anticipatory repudiation can come up in any type of contract, whether for goods or services, and can be either a major issue or a minor issue in Contracts essay questions.

We’re going to start off by talking about what constitutes anticipatory repudiation. Then we’ll move on to talking about the rights and remedies available to the non-repudiating party. Finally, we’ll work through a few anticipatory repudiation hypos adapted from real bar exam questions.

So, let’s get into it. Anticipatory repudiation occurs when a party unequivocally communicates that they are unable or unwilling to perform under the contract. Seems simple enough, but what does it mean for a party to “unequivocally communicate” that they are unable or unwilling to perform? Let’s go back to our painter/homeowner example. You’ll recall that under that contract, Peter
Painter is supposed to paint Holly Homeowner’s house on January 1. Now, let’s say that on November 15, Peter calls Holly and says, “Hey, I double-booked myself on January 1, and since the other job is paying me better, I’m not going to be able to paint your house anymore.” Peter’s statement seems pretty unequivocal, right? Based on his statement to Holly, it seems clear that he’s not going to paint her house on January 1 as promised under the contract.

Lee Burgess:

Now, let’s say that Peter instead calls Holly and says, “Hey, I just wanted to give you a heads up that my schedule is getting pretty tight in January. I’m hoping to still be able to get to your house on the 1, but honestly I might not be able to swing it.” In this scenario, Peter’s statement is far less certain. There is significant doubt as to whether Peter is going to be able to perform, but was Peter’s communication unequivocal? Probably not.

Lee Burgess:

If there has truly been an unequivocal statement, then that ends the analysis on this point. There has been an anticipatory repudiation, and you can move on to the nonbreaching party’s rights and remedies. But it’s more likely that you’ll be dealing with something less than an unequivocal statement, in which case there is an additional step.

Lee Burgess:

Here’s the rule for that next step: Where a party has reasonable grounds for being insecure about the other party’s performance, it may demand in writing adequate assurances from the other party that it will perform in accordance with the contract. If a party does not give adequate assurances after it is asked to do so, the demanding party may treat that as an anticipatory repudiation.

Lee Burgess:

It’s important to note that the demand for adequate assurances needs to be reasonable. So for example, after Peter expresses doubt about his being able to perform, Holly can send Peter an email asking him to provide written confirmation within 30 days that he will perform as promised. But she probably could not demand that he provide written confirmation within one day, because that would be unreasonable. Anything in between is somewhat of a grey area, so just make your best argument and move on.

Lee Burgess:

Now, assuming that Peter either makes an unequivocal statement that he will not perform, or fails to respond to Homeowner’s request for assurances, what’s poor Holly to do? She knows that Peter isn’t going to paint her house. Does she have to sit around and wait for January 1 to come and go before she can do anything about it? Not at all. That’s the beauty of anticipatory repudiation. Once Peter makes clear that he isn’t going to perform, Holly has several options. The first option is to treat the contract as repudiated and sue for damages before performance is due. A second option is to treat the contract as discharged and
Lee Burgess: Okay, we’re almost done with our rules; we just need to address one more issue that comes up. Anticipatory repudiation questions often contain scenarios where the repudiating party attempts to retract their repudiation. The rule for that issue is as follows: A repudiating party may retract its repudiation and restore the contract unless the other party has: (a) cancelled the contract, (b) materially changed their position, or (c) indicated that they consider the repudiation final.

Lee Burgess: Now that we have reviewed the rules and spent some time with Peter and Holly, we’re ready to look at a couple of hypos. But before we do, a couple of notes about Contracts essays involving anticipatory repudiation. Because anticipatory repudiation involves communications between the parties after contract formation, it is often tested in essays alongside modification, waiver, or estoppel. Essays testing anticipatory repudiation also usually ask about what damages could be recovered by the parties. We have intentionally removed facts related to these issues in these hypos, but you’ll want to keep those issues in mind as you practice.

Lee Burgess: Okay, without any further ado, let’s move on to our first hypo. This is adapted from the Contracts essay on the July 2018 bar exam:

Lee Burgess: “Stan, a farmer, agreed in a valid written contract to sell the Best Sauce Maker Company 5,000 bushels of tomatoes on July 1, at $100 per bushel, payable upon delivery.

Lee Burgess: On May 22, an employee of Delta Bank, where Best and Stan banked, told Best that rains had damaged Stan’s tomato crops and that Stan would be unable to fulfill all his contracts. Best called Stan and asked about the banker’s comment. Stan said, ‘Won’t know until June 10 whether I’ll have enough tomatoes for all my contracts.’ Best replied, ‘We need a firm commitment by May 27, or we’ll buy the tomatoes elsewhere.’

Lee Burgess: Stan did not contact Best by May 27. On June 3, Best contracted to buy the 5,000 bushels it needed from another supplier. On June 6, Stan told Best, ‘Worry was for nothing. I’ll be able to deliver all 5,000 bushels.’ Best replied, ‘Too late. We made other arrangements.’ Has Stan breached the contract?”

Lee Burgess: Okay, so we can immediately see that we have two statements that cast doubt on Stan’s ability to perform. This should tell you that you need to discuss
anticipatory repudiation. Start with a header for anticipatory repudiation and state the general rule. Next, you should determine whether there has been an unequivocal statement. The first statement by the Delta employee only indicated that Stan would not be able to fulfill all his contracts, not that he would not be able to fulfill Best’s contract. Similarly, Stan didn’t say that he wouldn’t fulfill Best’s contract, only that he wouldn’t know if he would be able to perform until later. In either case, there does not appear to be an unequivocal statement that Stan will not be able to perform.

Lee Burgess: Because there has been no unequivocal statement, the next step is to consider whether Best has reasonable grounds to demand adequate assurances of Stan’s performance. Let’s look at both statements. Delta’s statement arguably lacks credibility, because we don’t know for sure where the Delta employee got this information. If we only had this statement, that might not be enough to provide reasonable grounds for concern. But we also have Stan’s statement, which is directly from the horse’s mouth. So it’s probably reasonable for Best to be concerned and demand assurances of Stan’s performance.

Lee Burgess: But remember, those demands themselves need to be both in writing and reasonable. Here, Best made his demand on a call with Stan, so clearly it was not in writing. Also, Best demanded that Stan respond within five days, despite performance not being due for over a month. Under the circumstances, Best’s demand may have been unreasonable, in which case Stan’s failure to respond was not an anticipatory repudiation.

Lee Burgess: But you should not stop there. Remember that exam questions are close calls for a reason. The examiners want to see that you can identify and analyze all sides of an issue. On top of that, there are facts in this question that are relevant to a retraction analysis. So, even if you don’t think there was an anticipatory repudiation, you should assume that there was so you can move forward in your analysis and rack up those points.

Lee Burgess: So, let’s do that together. Assuming that Stan’s failure to respond was an anticipatory repudiation, the next issue is whether Stan retracted the repudiation on June 6 when he told Best he would be able to perform as promised. We know that Stan is allowed to retract his repudiation unless Best has cancelled the contract, materially changed his position, or indicated that he considers the repudiation final. Here, the question tells us that Best secured substitute performance from another supplier, which is a clear example of a party materially changing its position. And because Best secured substitute performance on June 3, before Stan’s retraction on June 6, Stan’s retraction was invalid.
Lee Burgess: Now, hopefully this hypo helped illustrate how the various rules work together. Let’s do one more. This one was adapted from the February 2015 California bar exam. This hypo is pretty similar to the last one, so we should be able to move through it quickly:

Lee Burgess: “Marta operated a successful fishing shop. She needed a new bait cooler, which had to be in place by May 1 for the first day of fishing season. On February 1, Marta entered into a valid written contract with Don to purchase a Bait Mate cooler for $5,500 to be delivered no later than April 15.

Lee Burgess: On February 15, Don called Marta and told her that he was having trouble procuring a Bait Mate cooler. Marta reminded Don that meeting the April 15 deadline was imperative. ‘I’ll see what’s possible’, Don responded in a somewhat doubtful tone. Concerned that Don might be unable to perform under the contract, Marta immediately sent him the following fax: ‘I am worried that you will not deliver a Bait Mate cooler by April 15. Please provide your supplier’s guarantee that the unit will be available by our contract deadline. I want to have plenty of time to set it up.’ Believing that Marta’s worries were overblown and not wanting to reveal his supplier’s identity, Don did not respond to her fax.

Lee Burgess: When Don attempted to deliver a Bait Mate cooler on April 15, Marta refused delivery. Marta had purchased a Bait Mate cooler from another seller on April 14. Has Marta breached the contract?”

Lee Burgess: Well, we clearly have a couple of statements casting doubt on Don’s ability to perform, but are they unequivocal? No. Don is merely expressing doubt as to his ability to procure the cooler. That means no anticipatory repudiation at this point. Moving on.

Lee Burgess: Does Marta have reasonable grounds to request adequate assurances? Yes, because Don himself expressed doubt that he would be able to perform. The question even tells us that after Marta reminded him that she needed the cooler by April 15, Don said, ‘I’ll see what’s possible’ in a “doubtful tone”. There’s no reason to argue with the question, just pick the low hanging fruit and move on.

Lee Burgess: Now, here’s where it gets a little bit tricky. Was Marta’s request for assurances reasonable? The question tells us that she faxed the request, so that satisfies the writing requirement. But what about the request itself? Is it reasonable to request that Don provide his supplier’s guarantee that the cooler might be
available by the contract deadline? Don clearly didn’t think so, and he might be right. For one thing, Don probably does not control his supplier and is not necessarily able to get his supplier to make such a guarantee. It also might be unreasonable to ask Don to reveal his supplier to his customers, who might later turn around and go straight to the supplier for their needs. On the other hand, Don didn’t just fail to provide his supplier’s guarantee, he didn’t respond at all despite having two months to do so. Even if he didn’t want to reveal his supplier, he could have at least provided his own assurance of performance.

Lee Burgess: So, you could go both ways on this one, and you should. The question this hypo is based on contained some additional facts and asked about both parties’ potential breaches and damages, which is a very common thing to do in a Contracts essay. That means that the examiners are expecting you to make arguments for both sides. So get your hands dirty in the facts and embrace the ambiguity! Just make sure that however you come down, you end with a strong conclusion.

Lee Burgess: And that’s all we have for today. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We’d really appreciate it. And be sure to subscribe so you don’t miss anything. If there are legal issues you want us to cover in our “Listen and Learn” series, drop us an email and we’re happy to look at them! If you have any questions or comments, please don’t hesitate to reach out to Lee or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website contact form at BarExamToolbox.com. Thanks for listening, and we’ll talk soon!

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