

Contracts II
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Spring 2004

Sample Exam Question #6 - Model Answer

On May 1, 2003, Shaggy agreed to purchase The Mystery Machine from Fred for \$20,000. Shaggy and Fred further agreed that Shaggy would pay Fred the full \$20,000 purchase price on or before July 1, 2003, and that Fred would, upon receipt of the full purchase price from Shaggy, transfer title to The Mystery Machine to Shaggy.

A. Which of the following statements or acts by Shaggy would constitute an anticipatory repudiation of his promise to Fred?

- 1. On June 1, 2003, Shaggy told Fred, “I recently lost my job at The Malt Shoppe, and I am not sure I’ll be able to pay you the entire \$20,000 by July 1st.”**

No. Shaggy’s statement is equivocal (“I am not sure ...”). An equivocal statement is not definite, and therefore is not a repudiation.

- 2. On June 1, 2003, Shaggy told his friend Velma, “I know Fred is planning to use the money I promised to pay him for The Mystery Machine to travel to Europe with Daphne. I’m sick and tired of him ending up with the girl and me ending up with the dog. I’m not going to pay him anything. The Mystery Machine is nothing but a rickety old house anyway.”**

Here, Shaggy’s statement is clear, unequivocal, and unconditional, but was not made to Fred or to anyone acting as Fred’s agent so as to give him constructive notice of Shaggy’s repudiation.

- 3. On June 1, 2003, Shaggy told Fred, “I have thought this over, and I am not going to pay you the money I promised you. How about a ‘Scooby Snack’ instead?”**

In order to have repudiated his promise, Shaggy must have definitely and unconditionally manifested to Fred his inability to, or his intent not to, perform as and when promised. Only “c” is an anticipatory repudiation, because only in “c” does Shaggy clearly, unequivocally, and unconditionally tell Fred that he cannot or will not perform as and when promised.

4. **On June 1, 2003, Shaggy told Fred, “The more I think about, the more I am convinced that you are asking too much for The Mystery Machine. Would you agree to sell it to me for \$15,000, instead of \$20,000?”**

Shaggy’s statement is not a repudiation because merely requesting more favorable terms or suggesting a modification to the terms of a contract does not repudiate the contract. On the other hand, refusing to perform unless the other party agrees to the more favorable terms does repudiate the contract.

N.B.: Statements 1, 2 (if it comes to Fred’s attention), and to a lesser extent 3, may give Fred reasonable grounds for insecurity, so as to justify him requesting from Shaggy reasonable assurances that Shaggy will perform as and when promised. *See* R2 § 2-609(1). And, if Fred properly requests the assurances and Shaggy does not respond adequately, then Shaggy’s failure to provide adequate assurances in response to a reasonable and proper request – but not Shaggy’s original statements themselves – will constitute an anticipatory repudiation. *See* § 2-609(4).

B. Assuming that Shaggy’s statement constituted an anticipatory repudiation of his promise to Fred, which of the following actions was Fred entitled to take in response to Shaggy’s repudiation? Please explain.

1. **Do nothing, hoping that Shaggy would, in fact, perform as and when promised.**
2. **Urge Shaggy to reconsider and to perform as and when promised.**
3. **Cancel the contract and retain The Mystery Machine.**
4. **Sell The Mystery Machine on June 24th to Mr. Greeley for \$15,000 and sue Shaggy for \$5,000.**

Fred can do all of the above. A promisee whose promisor has repudiated his obligation may elect to (1) cancel the contract, (2) bring suit against the promisor or otherwise act in reliance on the repudiation, or (3) do nothing, subject to the promisee’s obligation to mitigate damages, and await the promisor’s performance at the appointed time. § 2-610. The promisee may also, without prejudicing his right to any other remedy for the promisor’s repudiation, urge the promisor to retract his repudiation or to perform in spite of it. *See* § 2-610(b). If Fred elects to sell The Mystery Machine to Mr. Greeley in reliance on Shaggy’s repudiation, Fred may sue Shaggy for the difference between the contract price (\$20,000) and the “cover” price – that is, the price at which Fred was able to sell to another buyer – (\$15,000).

- C. **Suppose that, in order to sell The Mystery Machine to Shaggy “free and clear” of any liens or other impediments of title, Fred had to pay off the last \$5,000 he owed Gomez and Morticia Addams, from whom Fred bought The Mystery Machine 18 months earlier, and to obtain a release of lien from the Addamses and file it in the county personal property records. In light of Shaggy’s statement, did Fred have to go ahead and pay off the loan that was not otherwise due to be paid off until December 31, 2003? Please explain.**

No. Shaggy’s repudiation allows Fred to suspend his own performance, including any preparatory actions Fred had to take in order to perform his end of the contract to sell The Mystery Machine to Shaggy. § 2-610(c).

- D. **Suppose, instead, that Fred telephoned Shaggy on June 3, 2003 and asked Shaggy for assurances, no later than June 10th, that Shaggy would have the \$20,000 to purchase The Mystery Machine by July 1st. Assuming that Fred had reasonable grounds to demand adequate assurances from Shaggy that he would perform as and when promised, did Fred’s June 3, 2003 phone call constitute a proper request for assurances?**

Probably not. § 2-609(1) requires Fred to demand *in writing* assurances from Shaggy. Some courts have relaxed this requirement, as discussed in the excerpt from my article, but the statutory answer is that Fred’s phone call did not constitute a proper request for assurances.

- E. **Suppose, instead, that Fred faxed Shaggy on June 3, 2003 and asked Shaggy for assurances, no later than June 10th, that Shaggy would have the \$20,000 to purchase The Mystery Machine by July 1st. Assuming that (1) Fred had reasonable grounds to demand adequate assurances from Shaggy that he would perform as and when promised, and (2) Fred’s June 3, 2003 fax constituted a proper request for assurances, which of the following statements or acts by Shaggy, standing alone, would satisfy Fred’s request?**

1. **In response to Fred’s June 3, 2003 fax, Shaggy called Fred the next day and told him “I’ll do everything I can to make sure that I have the money by July 1st.”**

Promising to “do everything I can to make sure that I have the money by July 1st” is no more (and probably less) assuring than promising to have the money by July 1st – which Shaggy has already promised.

2. **On June 10, 2003, Fred received a letter from First National Bank of Squaresville informing Fred that the Bank would guarantee Shaggy’s promise to pay Fred \$20,000 on or before July 1, 2003, to purchase The Mystery Machine.**

The bank's guarantee that it will pay Fred the \$20,000 if Shaggy fails to do so is surely adequate assurance that Fred will receive the \$20,000 Shaggy promised him.

3. **On June 14, 2003, Shaggy called Fred to tell him "I just got off the phone with my financial adviser, who was on vacation all of last week, and I told her to sell some of the stocks I bought with the money I inherited from Uncle Bob. She said it would take a couple of days to get me a check, but I will have your \$20,000 before July 1st."**

Providing assurances on June 14th when Fred asked for them no later than June 10th does not satisfy § 2-609(4) because it was not within a reasonable time *under the circumstances*, even though it was within 30 days. The fact that Shaggy's delay was due to his financial adviser being out of town should not excuse his delay. If Shaggy had a sufficient portfolio to enable him to satisfy Fred by selling off part of the portfolio, Shaggy could easily have formulated another strategy for providing assurances that did not require letting Fred's deadline pass.

4. **On June 30, 2003, Shaggy showed up at Fred's house with \$20,000 in cash to purchase The Mystery Machine.**

While \$20,000 cash would likely have assured Fred under other circumstances, because Shaggy until the day performance was due to "show Fred the money," Shaggy failed to provide Fred "such assurance of due performance as is adequate under the circumstances." § 2-206(4). The fact that Shaggy's payment of \$20,000 cash on July 1st would have constituted full performance of his contractual obligation to Fred in the absence of Fred's reasonable grounds for insecurity ignores the fact that Fred properly requested assurances and that Shaggy did not give them in a timely fashion. *See* § 2-611(3).