Sellers Must Use Caution in Relying on a Customer's "First to Breach" to Justify Seller's Non-Performance

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Many suppliers contact us complaining about a buyer's alleged oppressive conduct and want to terminate the supply relationship or delay performance. One of the first grounds considered for such action, is whether the alleged conduct is a breach of contract by the buyer justifying termination of the contract by the supplier. The Michigan Court of Appeals recently restated the rules as to when a party to a contract can rely on the other party's "first to breach" to justify non-performance of its own obligations. Suppliers often allege they are no longer required to supply because the buyer is in breach of the supply agreement by taking unjustified debits, failing to approve change orders, etc.

The court in Vista Property Group, LLC v. Schulte, reaffirmed that to trigger the "first to breach" defense, the alleged breach by a buyer must be "substantial." Not every party's failure to comply or technical breach justifies termination, repudiation or rescission of the contract. "Substantial" means the breach has effected a substantial change in the essential operative elements of the contract causing a complete failure of consideration or the prevention of further performance by the other party. If the breach is not "substantial," the innocent party cannot terminate or cease its own performance, but it can recover monetary damages caused by the breach.

As a caution, the court stated, "... the injured party's determination that there has been a material breach, justifying his own repudiation, is fraught with peril, for should such determination, viewed by a court later in the calm of its contemplation, be unwarranted, the repudiator himself will have been guilty of material breach and himself become the aggressor, not an innocent victim." Thus, a supplier thinking of relying on the "first to breach principle" to justify non-delivery or other performance, should discuss the facts in "calm

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