

The Uniform Commercial Code: How it Effects Construction Contracts

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There are two types of contracts. A different set of laws applies to each. The common law of contracts governs a contract for services. The Uniform Commercial Code (UCC) applies to the sale of goods. However, many construction contracts are a mix of both goods and services. This type of contract is a hybrid contract. When a claim is in litigation, the court applies either common law or the UCC to a hybrid contract. The outcome of the case depends on whether the court interprets the contract as either predominately for services or for goods. This paper will highlight the major disparate rules applicable for each type of contract. It will also explain the different tests the court system uses to determine the contract type in dispute -- a services contract or a goods contract. Most cases involving construction contracts are service contracts and governed by common law. However, in 1974, the court applied the UCC to a hybrid contract in *Bonebrake v. Cox* developing the predominate thrust test and has since set precedence in many such cases. A study of court cases from the State of Georgia yields data on the hybrid contract issue with a sample of 12 cases. The qualitative survey resulted in the gravamen test and divisibility test as most used by the court system of Georgia. The character of the agreement itself must provide much defense as to the type of contract. Therefore, contractors should use several tests to advance their argument. This study will assist a contractor to develop a beneficial agreement that the legal system will support under interpretation.

Key Words: Construction Contracts, Hybrid Contracts, Predominate Thrust Test, Uniform Commercial Code

Introduction

Construction is fraught with contract claims because of the risky nature of the industry. The amount of risk in each construction project correlates directly with the number of involved variables. Variables within the project that produce risk include the owner, architect, contractor, subcontractors, and vendors; the weather; the economy; and the land where the project stands. All of these entities can be a variable or "fickle and inconsistent" (Webster's Collegiate Dictionary, 1996). These variables can lead to expensive claims and litigation. A thorough contracting process established at the onset of each construction project can limit some of these variables and avoid many potential claims.

One aspect of contracting involves determining the type of contract. There are two types: a) a contract for services or b) a contract for the sale of goods. Different laws govern each type of contract. The Uniform Commercial Code (UCC) Article 2 controls contracts for goods. The UCC defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale" (UCC, 2-105, 1995). The UCC defines sale

as "the passing of title from the seller to the buyer for a price" (UCC, 2-106, 1995). Alternatively, general contract or common law as outlined in Restatements 2nd governs contracts for services.

Construction contracts are classified as service contracts; meaning the contract is typically labor intensive. Many construction contracts, however, are actually a hybrid contract -- a mix of goods and services. For example, a hybrid is a subcontract by a mechanical contractor to supply both material and labor. A mechanical subcontract includes both the procurement and installation of the Heating Ventilating Air Conditioning (HVAC) system. Understanding that an agreement is a hybrid is important because the resolution of a dispute over a contract will differ depending on the nature of the agreement.

This paper will highlight the major disparate rules for each type of contract. It will also explain the different tests the court system uses to determine what type of contract is in dispute -- a services contract or a goods contract. This study will then provide examples of how the court utilizes these tests while construing when a hybrid construction contract is a valid Uniform Commercial Code (UCC) agreement and not a services agreement under Restatements 2nd and how these different rules effect the outcome of a claim. The result of this analysis will assist construction project managers in making informed decisions about contract offering and acceptance. It will place them in a better position to affect a contract breach.

Importance of the Study

As the construction industry becomes more prone to claims and litigation, legal scholars turn their attention to how the court system rules on these cases. Most cases involving construction contracts are service contracts and governed by common law (Soehnel, 1981). However, in 1974, the court applied the UCC to a hybrid contract in *Bonebrake v. Cox* and has since set precedence in many such cases. The application of the UCC in hybrid construction cases is now at the forefront of discussion.

One author states because a hybrid contract always involves a sale of goods, the addition of services in the contract muddles the definition. Therefore the court has a difficult time defining when and how the UCC applies to these types of contracts. This author believes the transfer of title should be removed as the definition of "sale" in the UCC. The words "vend", "vendor" and "purchaser" would provide a broader use of Article 2 in hybrid contract cases (96 Harv. L. Rev. 470, 1982). McAlpine and Breuch (1995) argue that "contractors ...need predictability in standard contracts, both in terms of content and interpretation. This is particularly true given the fact that contractors often do not have enough time to formulate bids, much less time to examine and determine the enforceability of each new variant contract clause. The greater the predictability of a contractual risk, the more accurately contingencies can be determined at the time bids are submitted." To add to the confusion, McLaughlin (1993) declares the UCC does not define its key terms and therefore the court relies on state common law to define such words as "offer", "acceptance" and "possession", mixing the two types of law in one ruling.

Hawkland (1995), one of the leading scholars on the UCC, states “...a large grey area exists in which contracts involving provisions of both goods and services do not readily fall into one category (of law) or the other.” This paper will outline the points of law that differ between a contract for goods and a contract for services and how the court applies them in a hybrid contract. In this way, contractors may determine for themselves how the court might rule on a dispute.

Review of Literature

The result of this literature search yields much discourse on how the rules of law apply to hybrid contracts. Several authors espouse regarding various tests the court system applies to determine if a hybrid contract is predominately for goods or for services. Many attempt to analyze Karl Llewellyn, the primary architect of the UCC, to try to make some sense of how he intended the court system to interpret UCC rules. However, this researcher found no evidence of a statistical analysis of the tests or any other theories that might assist in outlining the applications of the UCC. The following is some historical background on the UCC and delineation of the differences between common law of contracts and the UCC. This section concludes with details of seven tests and how the court applies them to hybrid transactions.

History of the UCC

Whitman (1987) writes that the philosophy behind the development of the UCC is traceable back to the Romantic era in Germany when the “group” became more important than the “individual” after the turn of the century. The concept of merchant law began to form, as a jury of peers became the prevalent thought of the day. They felt that a panel of fellow merchants should judge a merchant. Karl Llewellyn, chief author of the UCC, was an American legal scholar, schooled in Germany as a boy, who later returned as a visiting professor during this period. Whitman believed Llewellyn saw that common law did not protect the mercantile industry and determined that scholars should proffer separate legal rules. By the time Llewellyn returned to the US with this novel philosophy, the Depression had gripped the economy.

Kamp (1995) alleges that Llewellyn brought these theories back to this country at a time when the leaders of this nation were looking for anything that would bring the economy out of the Depression. Industry had changed from being entrepreneurial to being primarily led by the corporation. The economists of the time blamed the collapse of the economy on the greedy large corporation who paid low wages and undercut all competition. Therefore, purchasing power became non-existent. The development of the UCC intended to even the hands of competition and give decision-making power back to all merchants. The thought was that if both the buyer and the seller had the ability to control the outcome of a contract, then purchasing power would be restored to the buyer and the economy would be able to rebound. Kamp believes Llewellyn led the UCC development to rules that allowed both sides of a transaction equal power.

The development of the UCC began in the late 1930's, led by Llewellyn, and presented to various committees in the early 1940's. After much debate and editing, Congress formalized and adopted the UCC in 1952. It has since received further editing and was re-issued in 1962 and

again 1977. Most recently, scholars clarified the language in the UCC and re-published the Code in 1995.

General Contract Law vs. the Uniform Commercial Code

As previously stated, the common law of contracts and the UCC produce different outcomes when litigating a claim. The differences are as follows:

Contract Formation

The contractual process of offer and acceptance differs in general law and in the UCC. Under common law, to form a contract, the offeree must accept the exact form of the offer. The offeree prompts a counter-offer if acceptance differs in any way from the original understanding. Additionally, the offer must outline the means of acceptance. Actual acceptance requires strict adherence to the means. Conversely, reasonable formation of a contract under UCC Article 2-206 and 207 (1995) is by a mere expression of acceptance followed by a written confirmation even if the terms differ. The differing terms become an addition to the contract. No longer is the “mirror image” necessary when contracting for goods. The offering party accepts the differing terms unless they give 10 days notice of objection.

Contract Terms

The UCC rules differ from common contract law in outlining the terms of an agreement. Under common law, a contract must set out all terms. Otherwise, the contract is null and void. UCC Article 2-204(3) (1995), however, states that a contract will not fail due to the lack of definite terms. The quantity is the only term necessary in a goods contract. When the quantity is difficult to set, the contract invokes the reasonable requirements rule; i.e., the supplier will try within reason to meet the requirements of the contractor (UCC, Article 2-306, 1995).

Risk of Loss

Responsibility for the contracted merchandise differs between the UCC and common law. In case of damage, if a construction contract outlines which party is to bear the loss, these rules will prevail. When it does not and the contract is for services, there is no prevailing rule and frequently, court action ensues. Conversely, when the contract is for goods and the UCC prevails, Article 2 delineates who bears the loss. Under UCC Article 2-510 (1995), in the event of a breach, such as nonperformance, the breaching party bears the loss. Under UCC Article 2-509 (1995), where there is no breach and shipment is by common carrier, the responsibility of the shipment lies with the controlling party. The Free on Board (F.O.B.) designation names the controlling party. Should the contract state “F.O.B. Seller’s Location”, the risk of loss becomes the buyer’s when the carrier takes possession of the materials. This is a “shipment” contract. Should the contract state “F.O.B. Jobsite”, the seller bears the risk of loss until delivery of the goods to the jobsite. This is a “destination” contract. When there is no F.O.B. designation, the contract implies shipment (Robey, et al, 1986). When transportation is not by common carrier, the seller bears the burden until delivery of the goods to the buyer or to the buyer’s warehouse.

Right to Assurances of Ability to Perform

The UCC treats performance assurance differently from the general rules of contract law. Article 2-609 (1995) of the UCC provides a right to assurance of ability to either deliver or pay for any goods sold. Reasonable grounds for the insecurity must exist. “Commercial” standards such as a financial statement or letter of credit furnish adequate assurance of full performance. The common law of contracts, however, does not provide such rights unless stated specifically in the agreement. Under common law, a breach of contract claim is the only retort to a “repudiation”, an unwillingness to perform.

Implied Warranties

The UCC and common law also differ on warranty issues. The UCC provides for an implied warranty whereas the common law of contracts does not. Article 2-314 (1995) of the UCC “...provides that the goods will be fit for ordinary use and is considered a part of all contracts regardless of whether it is written in the contract” (Robey, et al, 1986). Article 2-315 (1995) states “...when the seller has or should have knowledge of the buyer’s out-of-ordinary needs, this implied warranty arises regardless of when it is written in the contract” (Robey, et al, 1986). Conversely, in a contract for services, plaintiffs must claim negligence if the contracted item does not perform as agreed. They must show a duty owed to the injured party and a violation of the appropriate standard of care. A claim of breach of express warranty (written guarantee) is also an option. In either case, the subjective burden of proof lies with the injured party (Marshall, 1979).

Statute of Limitations

General contract law and the UCC differ on statute of limitation issues. In all but six states, the statute of limitations under the common law of contracts is five years or more. Additionally, the statute of limitations begins upon discovery of the breach of warranty. Whereas, under the UCC, the statute for the sale of goods is four years from the cause of action. The “cause of action accrues when the breach ...should have been discovered” (UCC, Article 2-725(2), 1995).

Acceptance of the Work

The UCC and common law connect acceptance and conformance differently. Under general contract law, the work can be accepted and paid for and not conform to the contract documents. Hence, rejection of the work may be in whole or in part. Antithetically, under the UCC Article 2-606 (1995), acceptance of and payment for the goods does imply the compliance of the goods to the contract and rejection is not possible.

Unconscionability

General contract law and the UCC apply damages differently in the case of unconscionability. Where the court finds that enforcement of a contract or any clause in a contract was unconscionable, the UCC Articles 2-302 and 2-719 (1995) will not limit damages to the equivalent of the commercial loss. The UCC will allow additional compensation. This is not a defense allowed, however, under the common law of contracts (Gary, 1994). Contract law limits damages to a reasonable liquidated damages clause that approximates material loss or an actual documented loss.

Excuse for Nonperformance

The UCC and common law set different standards in determining non-performance. Under UCC Article 2-615 (1995), “non-performance may be excused if performance as agreed upon has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made. Under general contract principles, performance is excused only when performance of the contract is impossible” (Gary, 1994). Performance must occur no matter how difficult, even as the result of unforeseen changes (Calamari and Perillo, 1990).

The Tests

As demonstrated, the UCC and common law produce different results in a dispute regarding a contract breach. How a court interprets a hybrid contract, either as one for goods or for services, will alter the outcome of an action. Harris and Squillante (1989) state the appellate system applies one of seven tests to determine if a contract is predominately for services or for the sale of goods. The most commonly used measure is the predominant thrust test. This theory relies upon the intent of reasonable-minded persons and is as follows:

whether their predominate factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved ...or is a transaction of sales, with labor incidentally involved

The second test, predominate service, looks “to the evidence regarding the intent of the parties to the contract, the purpose for creation of the contract by the parties and which of the hybrid transaction aspects (sales/service) forms the basis of the bargain between the parties” (Harris and Squillante, 1989). The third test is for goods supplied. This test focuses on the definition of “goods” as outlined by the UCC. For example, a court applies the “movable at the time of contract” definition to determine whether or not the goods were a significant part of the contract. The court applies the policy test by considering the circumstances surrounding the making of the transaction as more important than the goods/services mix. When the buyer has no knowledge of the intricacies of the instrument and relies solely upon the skill and expertise of the seller, this test particularly applies.

Used infrequently is the divisibility test. In this application, the UCC applies to only that part of the contract that concerns goods. General contract law applies to the services portion. The contract language test relies upon the verbiage in the contract. The words buyer and seller indicate a contract for the sale of goods. Owner and contractor indicate a contract for services. Finally, the gravamen test focuses on the action at the center of the case. When the case is before the court because of a mechanical failure then it is a goods contract. When the claim is for defective workmanship, then it is a service contract. In all actions, the burden of proof falls upon the plaintiff to show which the contract is, a contract for goods or for services, by using any or all of the above tests.

Miller (1984) addresses the hybrid contract dilemma and postulates her own theory of appropriate tests. She claims the court system uses four tests to determine if a contract is for goods or for services. Each test, predominate thrust, predominate service, goods supplied, and

policy, she states, is flawed. These tests raise more questions than answers. Therefore, she proposes a “three tiered” test. This involves a combination of the predominate service, policy and gravamen tests. She believes the use of this type of test would allay any subjectivity the other tests create.

Gary (1994) states that the Georgia court system uses the predominate thrust test and the gravamen test to determine if a mixed contract is for goods or for services. He supports using both tests yet states that neither test is reliable. The predominate thrust test is so subjective that predetermining a court response would be impossible. Gary further deliberates that the gravamen test applies only to cases where quality is in question and does not address contract issues. He does not offer a resolution.

Hawkland (1995) states “the evolving test for characterizing a mixed sales service contract for the purpose of determining whether or not it is governed by Article 2 has been made to depend on whether one aspect or the other is dominant. ...it might be more sensible and facilitate administration... to abandon the “predominate factor” test and focus on whether the gravamen of the action involves goods or services”.

Other Applications

Recently, the courts in strict liability suits began using the tests to determine which rules apply to a claim. The cases involve transactions that are unclear as to whether it is a service or a sale. Cantu (1993) discusses the use of the predominate thrust test and the gravamen test. The court uses the tests to determine if the contract is for a product and strict liability applies or a service that requires proof of negligence.

Research Methodology

Many of the articles yielded in searches of Westlaw 6.0, a legal library database and other literary sources cited applicable cases. Additionally, a search of the UCC citations section of Westlaw using the key words “UCC”, “hybrid transactions”, “Bonebrake” and “construction” produced further results. Finally, a survey of court cases from the State of Georgia yielded primary data on the hybrid contract issue.

The primary data includes case profiles of those claims involving construction issues and are hybrid in nature. This researcher chose those cases that best fit this profile through a close reading of each case using a questionnaire to delimit the sample. The use of a questionnaire assisted in determining whether or not a court case fit the profile. The questions require open and closed responses. The Appendix includes the sample responses.

Results

In practice, the results of the use of the above tests by the court system vary in construction-related cases. In Bonebrake (1974), the case involved the sale and installation of bowling alley

equipment and the question of implied warranties and rights of assurance of ability to perform. The court determined that the contract's predominate thrust was for the sale of goods. The court based its decision partly on the language of the contract that referred to equipment and materials. Additionally, the court stated that the goods sold were movable at the time of contract as outlined by the definition of "goods" in the UCC. Therefore, the UCC did apply and an implied warranty for fitness of ordinary use did exist as did the right for assurances.

In *Meyer v. Henderson Construction Company* (1977), the cause concerned the statute of limitations on the procurement and installation of overhead doors. The court ruled the predominant thrust of the contract was for the sale of goods, although the materials required labor to be useful. The court noted that in the UCC section defining "goods", "there was no exemption for goods which require servicing before they could be used". Consequently, the statute of limitations was four years from the cause of action as outlined by the UCC.

In contrast, in *Cork Plumbing Company v. Martin Bloom Associates, Inc.* (1978), the plumbing contract in question was also for labor and materials. In this case, however, the court stated that the plumbing contractor "...took specific materials and apparatus, manufactured by various dealers, and assembled and connected them into a completed plumbing system. In construction of such a system the labor predominates, with the materials being merely an incident thereto". The court applied the predominate service test; i.e., they studied the purpose of the contract, and ruled it predominately a service agreement. The UCC did not apply. The court denied the requested rights of assurance for the ability to perform.

Like the case above, *Al Bryant, Inc. v. Hyman* (1975), involved labor and materials with the installation of carpet and the statute of limitations. Here the court could not decide if the contract was predominately for services or for goods. The court determined that construction contracts did not fall under the jurisdiction of the UCC because they involved the assembly of many different parts that became a whole. Further, the court stated that many construction contracts concerned such items as brick, wood, plumbing pipes, etc. which lose their individual identity when construction is complete. Carpet, conversely, would not lose its individual identity when installed. Therefore, the court concluded that the contract was not for construction and the UCC might apply to this action. Here again, the court applied the predominate service test by examining the purpose of the agreement. The appellate court sent the case back for trial.

Employment of the goods supplied test to the definition of "sale" under UCC Article 2 (1995) had opposite effects for contract claims involving concrete and steel. *Port City Construction Company v. Henderson* (1972) was a case where a company furnished all materials and labor for a concrete slab. The court applied the UCC because the contract met the contract for sale provisions where only the quantity needed definition. Whereas, in *Schenectady Steel Company v. Bruno Trimpoli General Construction Company* (1974), the UCC did not apply to an action involving the furnishing and erecting of structural steel for a bridge. The court stated that the transfer of the title, a necessary part of the definition of a sale in the UCC, was incidental to the agreement and was, therefore, not a contract for goods. The contractor had no rights of assurance of the steel erector's ability to perform.

The court utilized the policy test in *Riffe v. Black* (1977). This action involved an implied warranty of a swimming pool judged not fit for ordinary use. The court determined that the UCC provided relief even though the service portion was the defective aspect of the contract. It stated that the UCC applied "to services when the sale is primarily one of goods and the services are necessary to insure that the goods are merchantable and fit for ordinary purpose."

The court invoked the divisibility test in the implied warranty case of *Franklin v. Northwest Drilling Company* (1974). The court stated that the UCC only applied to that portion of the contract that concerned materials which were not defective. General contract law applied to the service portion of the agreement. The services were defective. The only action available was a case of negligence. A breach of contract would apply if the case had fallen under the rules of the UCC.

Frequently, the court applies the language test. In *B&B Refrigeration & Air Conditioning Service, Inc. v. Haifley* (1978), the contract was for the sale of goods because it referred to the "purchaser" and the "seller". The court applied the four year statute of limitations. Similarly, in a case involving the procurement and installation of resilient flooring, the agreement referred to the "subcontractor". Therefore, the court determined the contract was for services and the flooring contractor had no right to assurances of performance (*Ranger Construction Company v. Dixie Floor Company*, 1977).

In *Van Sistine v. Tollard* (1980), the divisibility test and the language test applied. The UCC did not govern, the court noting that the use of the terms "contractor", "install", and "move" indicated a service contract and that the bill from the contractor was predominately for labor. Therefore, although paid for, rejection of the work was possible. Similarly, in a case involving engineering and construction, the contract was for a fixed fee. It did not break down the price between engineering and construction services and material costs. The material costs were less than half the contract price. Therefore, the court concluded that the contract was predominately for services (*Lincoln Pulp & Paper Company v. Dravo Corporation*, 1977). Here, the court would not apply the liberal UCC rules of unconscionability and consequential damages.

The gravamen test applied in *Dixie Lime & Stone Company v. Wiggins Scale Company* (1977). The contract involved the sale and installation of a truck scale where the action before the court was because of the service and installation, not the scale itself. Since the alleged defects were in the service portion of the contract, the court determined that the UCC and notice as a condition precedent to an action for damages would not apply.

Finally, as stated previously, the burden of proof lies with the plaintiff. The entity bringing the action must use any of the above means to prove to the court the contract is either predominately for goods or for services. In *Air Heaters, Inc. v. Johnson Electric, Inc.* (1977), the owner had failed to meet its burden of proof showing that the contract was for the sale of goods. The court determined that the UCC could not apply. In a case involving the sale and installation of school chalkboards, tackboards, and lockers, the court would not apply the UCC because the supplier could not maintain its burden of proof that the primary purpose of the agreement was for the sale of goods (*Glover School & Office Equipment Company v. Dave Hall, Inc.*, 1977).

The Qualitative Survey

A qualitative survey of Georgia cases produced a sample size of 12. This researcher synthesized the results in Table 1 and performed a visual analysis of the outcome to determine frequency counts of the tests utilized by the court. The following table outlines the results of this case study:

Table 1

Survey of Construction Cases in Georgia

Case Name	Date	Construction Related	Hybrid Contract	UCC Rules Applied	Test Applied
US Ind v. Mitchell	1979	no	no	yes	n/a
Clow v. Metro	1977	yes	no	yes	n/a
Lamb v. G-Pacific	1990	yes	no	yes	n/a
Fram v. Crawford	1971	yes	no	yes	n/a
Romine v. Sav. Steel	1968	yes	no	yes	n/a
Decatur v. Glass	1986	yes	yes	no	gravamen
Gregory v. Scand.	1993	yes	yes	yes	divisibility
So. Tank v. Zartic	1996	yes	yes	yes	divisibility
PPG/Hardin v. Genson	1975	yes	yes	yes	none applied
Space v. Atlanta BS supplied	1977	yes	yes	unknown	goods
F-CC v. Air Door	1981	yes	yes	Yes, in part	gravamen
AAPCO v. Binswgr	1990	yes	yes	no	gravamen

Of the sample of 12, 11 cases are actually construction-related. Of those, seven are hybrid contracts. Of the tests applied by the court, three are gravamen, two are divisibility, one is goods supplied and one had no test applied.

Discussion

The survey found that the gravamen test was most often used by the Georgia court system, although several cases cite the *Gregory v. Scandinavian House* case using the divisibility test as setting precedence in Georgia. A larger sample size may provide different results. Additionally, this researcher found that cases where a hybrid contract is an issue are less frequent than anticipated. Two actions may resolve this potential problem. First, expand the term search of the databases to include “Gregory” and “mixed”. The court will cite Gregory in whatever case is at hand if it truly sets precedence. “Mixed” cites more frequently than “hybrid” when referring to contracts that include labor and materials. The term “hybrid” often produces cases on wheat and corn. Second, expand the case search to beyond the State of Georgia to the southeastern region. In this way, the increased population size should yield a larger sample. Finally, a statistical analysis would be invaluable in reliably determining which test(s) the court uses most often.

Conclusion

Much of the UCC expands legal actions for a purchase of goods. Contract formation is easier to prove. There is a simplification of quantified terms. The contract promulgates the risk of loss.

Rights exist that ensure performance. Implied warranties exist to guarantee of merchantability. Damage awards are not as limiting. Nonperformance has a defense of impracticability. Each of the aforementioned issues is more difficult to argue under common law.

Paradoxically, some of the UCC articles limit actions in the sale of goods. The statute of limitation commences and terminates earlier than in common law. The UCC also delineates conformity by the acceptance of the goods, whereas common law does not. Llewellyn intended to distribute the power evenly between the buyer and the seller. The dilemma lies in how the contractor wishes to have an agreement interpreted. Will the UCC rules benefit or injure the project in case of breach of contract?

Once the contractor determines the direction of the agreement, the character of the agreement itself must provide much defense as to the type of contract. The tests outlined above provide many examples of ways to promote the contract as one of services or one of goods. Legal scholars state the court system most often uses the predominate thrust test, even though it is subjective. A survey of Georgia cases indicates the gravamen test and divisibility test are used most often. Each author states that the use of the various tests to resolve the sales/services dilemma leaves much open to interpretation and reinterpretation. The historical researchers claim that this was also the intent of Llewellyn as he developed the UCC. However, all agree that the legal system would be less convoluted if the court developed more concrete rules for determining whether a contract was for goods or for services. Some have even postulated a new code similar to the UCC aimed at just construction contracts (McAlpine and Breuch, 1995).

Until the legal system defines these uncertainties, contractors should use additional tests to advance their argument; such as the language test, the divisibility test and/or the gravamen test. Claims are costly. This research will assist a contractor in developing a beneficial agreement that the legal system will support under interpretation. Forethought to contract formation and the use of specific language will save expenditures in contract disagreements, lower risks and increase profits in the construction industry.

The dilemma of hybrid contracts is certainly not limited to construction. The computer software industry and the mechanical repair industry, for example, also face legal disparities caused by the mix of goods and services. A broader survey of court cases outside the construction industry might enhance the argument of further definition of the laws applicable to hybrid contracts.

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