Notre Dame Law Review

Volume 59 | Issue 3 Article 6

1-1-1984

Goods/Services Dichotomy and the U.C.C.: Unweaving the Tangled Web

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The Goods/Services Dichotomy and the U.C.C.: Unweaving the Tangled Web

Article 2 of the Uniform Commercial Code ("U.C.C." or "the Code") applies to "transactions in goods."[1] While the U.C.C. does not define "transactions," it does define "goods."[2] Therefore, if a contract is purely for the performance of services, Article 2 does not apply.[3] Problems arise, however, when what is supplied in a contract involves both the sale of goods and the performance of services. The dichotomy becomes crucial when one party wishes to assert rights under the U.C.C.[4]

The question of whether Article 2 applies to a contract is one of fact.[5] Courts have developed various tests to answer this question in transactions involving both goods and services. Each of these tests purports to provide a court with guidelines for determining whether the transaction in question should be characterized as primarily one for goods or for services. Using the "predominantly service" test, a court looks at the intent and the objective of the parties to determine if the transaction is one that primarily involves services.[6] Using the second test, the "predominant factor" or "thrust" test, a court applies the U.C.C. to the transaction if the "thrust" of the transaction is the sale of goods.[7] Under the third test, the "final product" test, relying on the U.C.C.'s definition of goods, a court looks at the end or final

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1 Section 2-102 states in relevant part: "Unless the context otherwise requires, this Article applies to transactions in goods." U.C.C. § 2-102 (1978).

2 Section 2-105(1) defines "goods" as follows:

> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

U.C.C. § 2-105(1) (1978).

3 Such a contract would not come within the scope of Article 2. *See* note 1 *supra*; *see also* 1 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-105:35 (3d ed. 1981).

4 These rights can include warranty protections (§§ 2-312 to 2-318) and statute of limitations protections (§ 2-725). Article 2 must apply to a contract before an aggrieved party can claim its protections.

5 Squillante, *General Provisions, Sales, Bulk Transfers and Documents of Title*, 34 BUS. LAW. 1491, 1492 (1979); R. ANDERSON, *supra* note 3, § 2-105:51.

6 *See* Note, *Contracts for Goods and Services and Article 2 of the Uniform Commercial Code*, 9 RUT.-CAM. L.J. 303, 303-05 (1978); notes 23-42 *infra* and accompanying text.

7 *See* Note, *supra* note 6, at 308-12; notes 43-56 *infra* and accompanying text.

product to make the goods/services determination.[8] Under the final test, the "policy" test, a court simply determines on an *ad hoc* basis whether Article 2 should apply under the particular facts in question.[9]

Using these different tests has led to understandably inconsistent applications of Article 2 provisions.[10] A single, comprehensive test might eliminate some of the confusion and lead to more consistent decisions. Any new test would not solve all problems or anticipate all possible situations. Such a test could, however, lead to more consistent applications of the U.C.C.

Part I of this note reviews the relevant provisions of the U.C.C. and discusses the difficulty of determining whether Article 2 applies to a given set of facts. Part II reviews the tests which the courts have developed and discusses the advantages and the disadvantages of each test. Part III suggests a single test by which both practitioners and courts could determine whether the provisions of Article 2 would apply to a given contract.

I. Provisions of the U.C.C.

Article 2 applies to "transactions in goods."[11] Because a sale of goods is definitely a transaction within the scope of Article 2,[12] the question of whether Article 2 applies to a particular fact situation becomes whether the contract is in fact one for the sale of goods or for something other than goods, such as services.

The U.C.C.'s definition of goods emphasizes a tangible quality and movability.[13] If the contract in question is clearly one for the

8 *See* Note, *supra* note 6, at 309-12; notes 57-69 *infra* and accompanying text; *see also* note 2 *supra*.

9 *See* Note, *supra* note 6, at 312-15; notes 70-75 *infra* and accompanying text.

10 *See* cases cited in Annot., 5 A.L.R. 4th 501 (1981).

11 *See* note 1 *supra*. Because the term "transactions" is not defined, practitioners have argued that "the term encompasses contracts other than sales and that Article 2 is therefore applicable to these non-sale contracts." Annot., 4 A.L.R. 4th 85, 91 (1981). Predictably, courts have reached different conclusions when asked to decide whether Article 2 applies. Some courts have found that the scope of Article 2 is broader than sales. *See, e.g.*, Westmont Tractor Co. v. Viking Explor., Inc., 543 F. Supp. 1314 (D. Mont. 1982) (Article 2 applied to a lease arrangement); Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 593 P.2d 1308 (1979) (Article 2 applied to a bailment). On the other hand, other courts have limited the scope of Article 2 to sales. *See, e.g.*, DeMatteo v. White, 233 Pa. Super. 339, 336 A.2d 355 (1975) (Article 2 not applied to a contract for the construction of a residence); Computer Serv. v. Beacon Mfg. Co., 328 F. Supp. 653 (D.S.C. 1970), *aff'd*, 443 F.2d 906 (4th Cir. 1971) (Article 2 not applied to a contract for data processing services). *See also* 3 R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 1.03[4] (1982).

12 *See* U.C.C. § 2-106(1) (1978).

13 For the U.C.C.'s definition of goods, see note 2 *supra*. Obviously, that which is mova-

sale of goods or the performance of services, the question of whether the U.C.C. applies is answered easily. However, many contracts call for both the sale of goods and the performance of services. If the contract calls for both, the U.C.C. may or may not apply. Courts usually base this decision on whether the sales aspect or the service aspect predominates.[14] This factual determination is often difficult to make, since most contracts which call for both the sale of goods and the performance of services do not differentiate explicitly between these aspects. The parties agree on one price for the entire contract without specifying the portion respectively allowed to the sale of goods and the performance of services. Moreover, both the sale of goods and the performance of services are often crucial to the successful completion of the contract. The goods may be useless unless services are performed to make them functional. The services may be pointless in themselves, but necessary to make the goods functional. One aspect may well be useless without the other.[15] Because determining which aspect of the contract predominates is often difficult, results can be inconsistent.[16]

In deciding whether the U.C.C. should apply to a particular transaction, a court should consider the U.C.C.'s policy of liberal interpretation.[17] This policy encourages a court to construe the U.C.C. "so as to secure a reasonable meaning, to effectuate the intention of its framers, and to make the Code workable and serviceable."[18] The policy of liberal interpretation gives a court the opportunity to be flexible when reconciling precedent with a new set

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ble is tangible. Securities and "things in action" are intangible, and thus excluded from the category of goods.

14 *See* cases cited in Annot., 5 A.L.R. 4th 501 (1981).

15 *See, e.g.*, Meyers v. Henderson Constr. Co., 147 N.J. Super. 77, 370 A.2d 547 (1977). The contract at issue quoted one price for the sale and installation of overhead doors, with no differentiation between sales and service. Both were necessary for the successful completion of the contract. *See also* note 49 *infra* and accompanying text.

16 *See* note 10 *supra* and accompanying text.

17 Section 1-102 of the U.C.C. provides in relevant part:

> (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (2) Underlying purposes and policies of this Act are
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions.

U.C.C. § 1-102 (1978); *see also* note 75 *infra*.

18 R. ANDERSON, *supra* note 3, § 1-102:16; *see* 1 A. SQUILLANTE & J. FONSECA, THE LAW OF MODERN COMMERCIAL PRACTICES § 2:1 (rev. ed. 1980).

of circumstances.[19] Thus, in determining whether the U.C.C. should apply to a particular transaction, a court cannot look only to precedent in the jurisdiction, but must look also to the policy behind the U.C.C., and balance those considerations.[20]

II. The Current Tests

Article 2 does not provide any guidelines for interpreting contracts calling for both the sale of goods and the performance of services. Therefore, in order to determine whether Article 2 applies in a given situation, courts have developed various tests. Each test provides its own set of guidelines for determining whether the transaction in question is one for the sale of goods or the performance of services, or, given that both goods and services are involved, which predominates. Four separate tests can be identified:[21] (1) the predominantly service test; (2) the predominant factor or thrust test; (3) the final product test; and (4) the policy test.

A. *The Predominantly Service Test*

When applying the predominantly service test, a court examines the parties' intent and objective as evidenced in the transaction.[22] The New York Court of Appeals articulated this test in *Perlmutter v. Beth David Hospital*,[23] a pre-Code case that involved an issue similar to the Code's goods/service dichotomy.[24] In *Perlmutter*, the court found that a blood transfusion which infected the recipient with hepatitus was not a sale of goods but rather was part of the service of medical treatment. Therefore, the warranty provisions of the New York Sales Act did not apply.[25] The court stated that the parties had

19 *See* U.C.C. § 1-102, comment 1 (1978). How flexible a court actually is seems to depend at least to some extent on the starting point of the test the court employs. Thus the predominantly service test, which looks first at the services performed, tends to find that the U.C.C. does not apply. *See* text accompanying notes 29-42 *infra*. The predominant factor and the final product tests, which focus on the goods supplied, apply the U.C.C. more often. *See* text accompanying notes 48-56 and 57-69 *infra*.

20 The policy test illustrates this balancing act most clearly. *See* text accompanying notes 70-75 *infra*.

21 *See* notes 6-9 *supra* and accompanying text.

22 *See* Note, *supra* note 6, at 303-05.

23 308 N.Y. 100, 123 N.E.2d 792 (1954).

24 While not the first court to address this issue, the *Perlmutter* court delineated its reasoning clearly, and its analysis resembles closely that of post-Code cases using the predominantly service test. *See id.* at 104-06, 123 N.E.2d at 793-95.

25 The relevant portions of the warranty provisions of the Sales Act read as follows:

> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer

bargained for the medical treatment, not for the sale of supplies used in the treatment.[26] The court based its decision at least in part on the public policy rationale that hospitals provide essential services and should not be held liable for circumstances which they could not control while exercising due care.[27] Other courts have cited *Perlmutter*, and some have extended its basic reasoning to transactions not involving the supplying of blood.[28]

In applying the predominantly service test, courts examine the structure of and the language contained in the contract which may indicate the parties' objective. The parties may treat the transaction as a whole in the contract, not dividing it into separate sale and service components. If the parties do not specifically designate a transaction as a sale of goods, and if the service aspect is crucial, a court may deem the contract to be one in which service predominates. For example, in *Gulash v. Stylarama, Inc.*,[29] the plaintiffs sued for damages based on the breach of an implied warranty for a swimming pool. The Superior Court of Connecticut rejected the claim, stating that since the contract was not specifically designated as a sale of the pool,[30] the contract for the installation of the pool was primarily for labor. The court could not separate the sale of the materials from the installation process. Therefore, because the contract did not separate the transaction into specific components and because the plaintiffs could not establish the existence of any implied warranty, the court found that the U.C.C. did not apply.[31]

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relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

N.Y. PERS. PROP. LAW § 96 (McKinney 1962).

26 308 N.Y. at 106, 123 N.E.2d at 795.

27 No feasible method existed by which to test the blood for hepatitus without destroying it. *Id.*

28 See Note, *supra* note 6, at 307 n.31 for cases which have cited *Perlmutter* and extended its reasoning.

29 33 Conn. Supp. 108, 364 A.2d 1221 (1975).

30 *Id.* at 111, 364 A.2d at 1223. The court stated that it must look to the objective of the parties: " 'In determining whether a contract is for sale of property or services the main objective sought to be accomplished by the contracting parties must be looked for.' " *Id.* at 112, 364 A.2d at 1224 (quoting Ben Constr. Corp. v. Ventre, 23 A.D.2d 44, 45, 257 N.Y.S.2d 988, 989 (1965)).

31 33 Conn. Supp. at 113, 364 A.2d at 1224. The party wishing to establish that the contract is one for the sale of goods carries the burden of proof on this issue. R. ANDERSON, *supra* note 3, § 2-105:50.

In applying the predominantly service test, a court may find that the nature of the services rendered in a transaction providing both goods and services indicates that the contract is one in which the service aspect is meant to predominate. The parties may see the goods involved as simply an outgrowth of the services provided even though the successful completion of the contract may actually culminate in or require the furnishing of these goods. For example, in *Care Display, Inc. v. Didde-Glaser, Inc.*,[32] the Supreme Court of Kansas held that a contract for furnishing a display booth was not within the Article 2 statute of frauds provision (section 2-201) because the contract was for the performance of services, not for the sale of goods.[33] Didde-Glaser wanted a display booth, but it intended to use Care Display's creative services to get the type of booth it wanted. The court found that the parties contemplated a contract in which the performance of services predominated; therefore, Article 2 did not apply.[34]

Creative and other services, such as repair[35] and building[36] services, all result in goods of some kind, but the services provided ordinarily predominate. The resulting tangible goods may not be distinguishable from other like goods, but the services, at least in the minds of the parties, particularly the buyer's, may be distinguishable. A buyer may have subjective reasons for choosing a particular design service, building service, or repair service, for example. If a buyer bases his decision to enter into a transaction including both goods

32 225 Kan. 232, 589 P.2d 599 (1979).

33 *Id.* at 238-39, 589 P.2d at 605. The court stated:

> True, the construction, transportation, and installation of the display booth was a part of the contract between the parties but the major objective contemplated utilizing the knowledge and expertise of Care Display to create a unique setting in which to exhibit and promote to best advantage the products of Didde-Glaser.

225 Kan. at 239, 589 P.2d at 605.

34 *Id.* at 238-39, 589 P.2d at 605.

35 The United States District Court for the Eastern District of Kentucky in T-Birds, Inc. v. Thoroughbred Helicoptor Serv., 540 F. Supp. 548 (E.D. Ky. 1982) held that the U.C.C. warranty provisions did not apply to a contract for engine work. "The predominant aspect of the contract was the rendition of services, i.e., a major engine overhaul of T-Birds' helicopter." *Id.* at 551. The parties primarily intended that T-Birds perform a service, not deliver goods (in the form of replacement parts or an overhauled engine).

36 In G-W-L, Inc. v. Robichaux, 643 S.W.2d 392 (Tex. 1982), the Supreme Court of Texas held that the Texas Business and Commerce Code (the state's version of the U.C.C.) warranty provisions did not apply to a contract to build a house. The court determined that the "essence" of the contract involved was "the furnishing of labor and the performance of work required for constructing the house." *Id.* at 394. While the furnishing of tangible materials was necessary to the successful completion of the contract, the court concluded that the parties intended that the construction process predominate. *Id.*

and services with a party based on the quality or nature of the services provided by that particular party, as was the case in *Care Display*,[37] a court could reasonably find that the parties intended the service aspect to predominate.

Since the predominantly service test determines if the goods aspect or the service aspect of a contract predominates by examining the parties' intent and objective, it is simple to apply once the parties' intent and objective have been determined. However, the test has limited usefulness. In cases where courts have applied the test, the service aspect of the contract has usually been both crucial to the contract and easy to identify.[38] However, the intent of the parties to contract for the sale of goods or the performance of services may not be as distinguishable as the courts suggest. The parties usually would not intend to bargain separately for goods and services in the sale transaction.[39] Presumably, the buyer wants both the services and the finished product, but may see the services as merely a way of getting the finished product. This may well be the case if the services are routine. When using the predominantly service test, courts tend to find that the U.C.C. does not apply, thereby disregarding, at least to some extent, the U.C.C.'s policy of liberal application.[40] Given both the broad interpretation of parties' intent and objectives that courts can employ and the possibility of disregarding the U.C.C.'s policy,[41] this test is perhaps best limited to use in cases where the services are both crucial to the contract and unique to the particular circumstances.[42]

B. *The Predominant Factor or Thrust Test*

The predominant factor or thrust test applies Article 2 to a

37 225 Kan. at 239, 589 P.2d at 605.

38 This is especially true in the cases previously cited. *See* notes 29-37 *supra* and accompanying text.

39 *See* 1 R. ALDERMAN, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.12 (2d ed. 1983). The buyer usually would neither make separate purchases of goods and services from the same seller, nor purchase goods and services from different sellers.

40 *See* notes 17-18 *supra* and accompanying text. The U.C.C.'s liberal interpretation policy favors application of the U.C.C. whenever appropriate. *See* U.C.C. § 1-102, comment 1 (1978).

41 *See, e.g.*, Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 364 A.2d 1221 (1975) (parties intended a contract for the installation of a swimming pool to be one for services only). While § 2-102 indicates that the U.C.C. is not to apply in all cases, in circumstances where it reasonably could apply, as in *Gulash*, the U.C.C.'s goal of liberal interpretation may be thwarted.

42 Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954), and Care Display, Inc. v. Didde-Glaser, Inc., 225 Kan. 232, 589 P.2d 599 (1979), both fit into this category. *See* notes 23-27, 32-34 *supra* and accompanying text.

transaction if the thrust of the transaction is the sale of goods rather than the performance of services.[43] While the predominantly service test focuses on the services performed, the predominant factor test focuses on the goods supplied. Unlike the predominantly service test, the predominant factor test tends to favor application of the U.C.C., and therefore follows more closely the Code's liberal application policy.[44]

In applying the test, a court ascertains the thrust of a transaction by examining the parties' intent as revealed in the contract itself, or in the circumstances surrounding the transaction. *Bonebrake v. Cox*[45] illustrates such a situation. In *Bonebrake*, the United States Court of Appeals for the Eighth Circuit held that a contract to deliver and install bowling equipment, which contained warranties stating that the equipment would be free from defects both in materials and labor, was a contract for the sale of goods. The court articulated the predominant factor test as follows:

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (*e.g.*, contract with artist for painting) or is a transaction of sale, with labor incidentally involved (*e.g.*, installation of a water heater in a bathroom).[46]

Applying this test, the court said the contract language was "peculiar to goods, not services."[47] The court also reasoned that although the installation of the equipment was a necessary part of the contract, the thrust of the contract was the sale of the equipment, since the buyers primarily wanted and bought the equipment. The labor, though significant, was "incidentally involved."[48]

In addition to examining the parties' intent, a court may also ascertain the thrust of a transaction by looking at the *nature* of the services involved. The services may indeed be necessary to the successful completion of the contract, but only insofar as they make the tangible goods useful.[49] In such cases the services are performed only

43 *See* Note, *supra* note 6, at 308-12.

44 *See* note 17 *supra*.

45 499 F.2d 951 (8th Cir. 1974).

46 *Id.* at 960.

47 *Id.* at 958.

48 *Id.* at 960.

49 In Meyers v. Henderson Constr. Co., 147 N.J. Super. 77, 370 A.2d 547 (1977), the court held that the U.C.C. applied to a contract to supply and install overhead doors. The unassembled doors were put together and installed in the buyer's building. The court noted

as a means to an end, and not for their own sake. If a court finds that the services fulfilled this purpose *only*, it will likely find that the predominant thrust of the contract was one for the sale of goods. *Bonebrake*, where the services were needed only to make the bowling alley equipment functional, is illustrative.[50]

Also illustrative is *Riffe v. Black*.[51] In *Riffe*, the Court of Appeals of Kentucky concluded that the warranty provisions of the U.C.C. applied to a contract for the installation of a swimming pool. The court stated that the warranty provisions "apply to services when the sale is primarily one of goods and the services are necessary to insure that those goods are merchantable and fit for the ordinary purpose."[52] As in *Bonebrake*, the services in *Riffe* were necessary, but only to the extent that they made the goods useful.[53]

Like the predominantly service test, the predominant factor test is also simple to apply, and it allows for liberal application of the U.C.C.,[54] but also like the predominantly service test, it has its disadvantages. The test, when applied expansively,[55] could become overinclusive. Goods will be involved in most transactions, and will generally be used by the buyer after the services are completed. The test gives a court a great deal of discretion. In applying the predominant factor test a court could, by acknowledging these remaining goods, encompass in the U.C.C. all transactions which are not wholly service contracts, a result probably not intended by the U.C.C.[56]

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that the "overhead doors were useless without the performance of installation services," and stated that both the sale of the goods and the performance of the services were necessary. *Id.* at 82, 370 A.2d at 550. Nevertheless, the court approved the *Bonebrake* test, stating that the buyer's "predominant reason" for making the contract was to get the doors. The court used the *Bonebrake* test because it knew of no "surer way" to determine whether the U.C.C. applied to the transaction. *Id.*

50 *See* notes 45-48 *supra* and accompanying text.

51 548 S.W.2d 175 (Ky. Ct. App. 1977).

52 *Id.* at 177.

53 *Cf.* Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 364 A.2d 1221 (1975) (with facts that mirror those in *Riffe*). The decision in *Riffe* using the predominant factor test contradicts the decision in *Gulash* using the predominantly service test. *See* note 64 *infra*.

54 *See* note 44 *supra*.

55 By its own admission, the court in Snyder v. Herbert Greenbaum and Assoc., 38 Md. App. 144, 380 A.2d 618 (1977), applied the predominant factor test expansively. *See* text accompanying notes 85-87 *infra*.

56 In Computer Serv. v. Beacon Mfg. Co., 328 F. Supp. 653 (D.S.C. 1970), *aff'd*, 443 F.2d 906 (4th Cir. 1971), the court held that a contract for data processing services was a contract for the performance of services, not for the sale of goods, "and to claim to the contrary strains the imagination." 328 F. Supp. at 655. However, if the predominant factor test were expanded to acknowledge all remaining tangible items, the resulting computer printouts could be classified as goods. Article 2 would then apply to this transaction. *See* note 11 *supra*.

If a court applied similar reasoning to the facts of T-Birds, Inc. v. Thoroughbred

C. *The Final Product Test*

The third test courts have used to determine whether a particular transaction falls within the U.C.C. is the final product test. When applying this test, a court focuses on the end or final product to determine whether it fits the U.C.C.'s definition of goods.[57] This definition emphasizes special manufacture,[58] movability, and identification of goods to the contract.[59] Courts applying the final product test in a case balance these indicia against the services involved in the transaction to determine whether the contract is one for goods or for services. Unlike the predominantly service test or the predominant factor test, the final product test relies on a strict reading of the U.C.C.'s definition of goods.[60]

By applying the final product test, courts acknowledge that services are often crucial to the successful completion of a transaction. Though the services involved in the transaction may be substantial, if the end product is specially manufactured and movable, a strict application of the final product test by a court can bring the transaction under the provisions of the U.C.C. For example, in *Lake Wales Publishing Co. v. Florida Visitor, Inc.*,[61] the District Court of Appeal of Florida held that the U.C.C. statute of limitations applied to a contract for printing pamphlets. Basing its decision on the U.C.C.'s definition of goods, the court reasoned that the pamphlets were goods because they were movable when finished.[62] In addition, the pamphlets were specially manufactured, a further reason for fitting them into the U.C.C.'s definition of goods. The court acknowledged that services played a large part in the production of the pamphlets, but concluded that "any services rendered were of necessity related to production of the items."[63]

As its name suggests, the final product test emphasizes that which is left when the contract is completed. Services may be necessary to give goods their final form. However, if these services are

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Helicoptor Serv., 540 F. Supp. 548 (E.D. Ky. 1982), the resulting overhauled engine could also be classified as goods, and Article 2 would apply to the repair work. *See* note 35 *supra*.

57 *See* note 2 *supra*.

58 Specially manufactured goods are "goods that are designed specially for the buyer and goods that follow the same design as the other products of the seller and the 'special' element is found in the fact that the seller produces the goods in order to fill the particular order of the particular buyer." R. ANDERSON, *supra* note 3, § 2-105:42.

59 *See* Note, *supra* note 6, at 309-12.

60 *See* notes 61-66 *infra* and accompanying text.

61 335 So. 2d 335 (Fla. Dist. Ct. App. 1976).

62 *Id.* at 336.

63 *Id.*

likely to follow a specific plan, and if the final product can be contemplated in detail before it actually exists, then the final product is identifiable when the contract is made and the product can be classified as goods and thus brought under the U.C.C. Stretching the final product test to its outer boundaries, the Appellate Court of Illinois in *Meeker v. Hamilton Grain Elevator Co.*[64] held that the U.C.C. applied to a contract for the installation of grain bins. Even though the bins were unassembled at the time the contract was made, and although a good deal of service was required to put them together, they were movable and identifiable as bins.[65]

On the other hand, although a transaction may result in a final tangible product, under the final product test the transaction may not be covered by the U.C.C. if it does not meet the U.C.C.'s "movability" requirement for goods. Though a house is a tangible, identifiable product, it is not movable, thereby preventing the contract for its construction from being covered by the U.C.C. In *G-W-L, Inc. v. Robichaux*, the court came to this conclusion, emphasizing the Code's requirement of movability.[66]

Courts attempt to base the final product test in the U.C.C.'s definition of goods, and while this attempt works well at times,[67] at other times it may be too restrictive.[68] Parties to any contract naturally contemplate some end to all contracts. If any tangible, movable object is contemplated, the final product test could bring all contracts in which such an object is contemplated under the U.C.C. Because some tangible goods are produced under many contracts, if the service aspect were truly meant to predominate,[69] applying the final product test would mischaracterize the parties' intentions and lead to inequitable results.

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64 110 Ill. App. 3d 668, 442 N.E.2d 921 (1982).

65 *Id.* at 671, 442 N.E.2d at 923.

66 643 S.W.2d 392, 394 (Tex. 1982). The court in *G-W-L* relied heavily on the concept of movability when it held that the Texas Business and Commerce Code did not cover a contract to build a house. The house was not movable within the scope of the Code's definition of goods, nor was the house to be moved at a later time. *Id.*

67 The test worked well in *Lake Wales* because the printed pamphlets fitted neatly into the U.C.C.'s definition of goods. *See* text accompanying notes 61-63 *supra*.

68 The court in *G-W-L* based its decision on a literal reading of the Code's definition of goods, and its holding under this interpretation was in effect a foregone conclusion. A house is not commonly considered a movable object. Some might argue that the U.C.C.'s goal of liberal application was frustrated. *See* note 66 *supra*.

69 Once again, Computer Serv. v. Beacon Mfg. Co., 328 F. Supp. 653 (D.S.C. 1970), *aff'd*, 443 F.2d 906 (4th Cir. 1971), illustrates this point. The final, tangible product was a computer printout. If the court had applied the final product test to bring the transaction under the U.C.C., the focus of the contract, the actual services, would have been ignored.

D. *The Policy Test*

The final test used by the courts is the policy test. In applying the policy test, a court simply looks at the particular facts in question and determines on an *ad hoc* basis if the U.C.C. should apply to the transaction.[70] This test has no set criteria, but rather focuses on issues of equity and public policy.

In using the policy test a court can acknowledge that in many transactions the parties do not have the same levels of knowledge and experience.[71] The buyer in particular may be relying on the seller's professed superior knowledge and experience. In such transactions the service aspect may be great, and the tangible items provided may be consumed in the process or incorporated into a larger item. However, a court applying the policy test may use the buyer's reasonable expectations and reliance on the seller's superior knowledge and experience as justification for holding that the U.C.C., and consequently its consumer protectionism, applies to the transaction. For example, in *Newmark v. Gimbel's Inc.*,[72] the Supreme Court of New Jersey stated that the implied warranty provisions of the U.C.C. should apply to a transaction (a permanent wave given in the defendant's beauty parlor), even though it was not technically a sale.[73] Noting that public policy encourages reasonable reliance on superior knowledge and skill, the court reasoned that because the defendant had asserted such superiority by offering the service, the plaintiff would be entitled to protection under the implied warranty provisions of the Code, provided she could prove her case.[74]

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70 *See* text accompanying note 9 *supra*.

71 This is another instance in which a buyer may choose a particular seller for a particular reason. *See* text accompanying notes 35-36 *supra*.

72 54 N.J. 585, 258 A.2d 697 (1969). The plaintiff suffered injuries to her scalp and hair after she received a permanent wave in defendant's beauty parlor. *Id.* at 589-91, 258 A.2d at 699-700.

73 *Id.* at 593, 258 A.2d at 701. The trial court had found that the transaction was not a sale within the scope of U.C.C. § 2-106, because no separate charge had been made for the solution. The Supreme Court of New Jersey felt this distinction was artificial. *Id.* at 592-93, 258 A.2d at 700-01.

74 *Id.* at 601, 258 A.2d at 705. The court based its decision on the facts that (1) the defendant had exclusive control over the choice and application of the solution, and (2) the plaintiff reasonably expected that the defendant's superior knowledge in the area would protect her. *Id.* at 593-94, 258 A.2d at 701. *See* R. ALDERMAN, *supra* note 39, § 1.12 n.28.

Similarly, in Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971), the Supreme Court of Nevada found a contractor liable for fire damage caused by a defective fitting on a water heater installed, but not supplied, by the contractor. The court based its decision on the plaintiff's reasonable expectation that she could rely on the defendant's superior skill. *Id.* at 208, 484 P.2d at 576.

On the positive side, the policy test allows courts not only to liberally apply the U.C.C. by finding that it covers transactions in question,[75] but also to protect the reasonable expectations of consumers by acknowledging their reliance on the expertise of sellers. The policy test frees a court from the mechanical application of one of the other tests in order to consider the equities involved in a particular situation. However, the policy test's shortcoming is its *ad hoc* decisional nature, which leads to inconsistencies and makes parties unsure of their status in the event a dispute arises. In a commercial setting, this is especially significant since businesses must, if possible, structure their transactions to avoid such liability. Any solution to the problem must therefore balance the flexibility needed for a court to solve equitably each dispute and the certainty needed for business planning and negotiation.

III. A Proposed "Three-Tiered" Test

The current tests can and do result in courts inconsistently applying the U.C.C.[76] A single, comprehensive test might eliminate some of the confusion and lead to more consistent decisions. A new test should focus on what is done in addition to supplying tangible products. The amount, type, and difficulty of service supplied plays a large part in determining whether a mixed contract is predominantly one for the sale of goods or for the performance of services. Other factors to be considered when formulating the test include the parties' intent and expectations as reflected in the contract, and any equitable considerations involved. Therefore, a three-tiered analysis would be involved, with an examination of the service given priority, and the parties' intent and expectations and equitable considerations given a lower priority.

The first factor to be examined in the new test is the intent and expectations of the parties. If the parties to the contract specify

75 Liberal interpretation of the U.C.C. under this or any other test must be "limited to its reason." U.C.C. § 1-102, comment 1 (1978). *See* notes 17-18 *supra* and accompanying text.

76 The predominantly service test and the predominant factor test illustrate this inconsistency clearly. "Any test that is predicated on what is deemed to be the essence or predominant character of a contract has in it a considerable amount of subjectivity. Inevitably, therefore, different conclusions on facts that seem more identical than distinguishable can be expected." R. DUESENBERG & L. KING, *supra* note 11, § 1.03[1]. *Compare* Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 364 A.2d 1221 (1975), *with* Riffe v. Black, 548 S.W.2d 175 (Ky. Ct. App. 1975). The *Gulash* court applied the predominantly service test, and concluded that the contract for the installation of a swimming pool did not come under Article 2. However, the *Riffe* court applied the predominant factor or thrust test and concluded that a similar contract was indeed covered by Article 2. *See* Annot., 5 A.L.R. 4th 501 (1981).

whether the contract is to be for the sale of goods or for the performance of services, or in a mixed contract, which aspect is to predominate, their explicit expressions should control whether Article 2 provisions apply.[77] However, parties rarely make such explicit expressions of intent in the contract itself, and disputes often arise. If the parties' intent and expectations cannot be ascertained, courts should then turn to the next factors: the nature and difficulty of the services, and the equities involved in the transaction.

An analysis of the nature and difficulty of the services involved must be the major factor in a new, single test. A court cannot determine whether the contract is for the sale of goods or the performance of services based on the presence of goods alone. If it could, Article 2 could apply to all contracts, from those for the sale of a television set in a retail store to those in which a television repairman replaces a tube while fixing the set. Therefore, the nature and difficulty of the services provided in mixed contracts should largely determine whether Article 2 applies.

If the services performed in connection with the supplying of tangible products are routine in that they follow a standard procedure, a court should find the contract to be one for the sale of goods, and thus subject to Article 2. In such a situation, the services would be performed only to make the desired goods useful. These services would include hooking up a piece of equipment to make it usable, or putting together pieces of a product according to a standard plan or procedure. The characteristics of these types of services are: 1) they are necessary to make the goods useful, but are usually performed according to standard procedures, 2) they would require skill to be executed properly, but not necessarily to be created, and 3) they would not be unique to the circumstances.

Applying this analysis, a court should find that a transaction such as installing a pool, as in *Gulash v. Stylarama, Inc.*,[78] to be not a contract for the performance of services, but rather a contract for the sale of goods. Though the services involved in installing a swimming pool are significant and must be performed properly to make the

77 *See* R. DUESENBERG & L. KING, *supra* note 11, § 1.03[1]. The parties' freedom to construct their own agreement is of course limited by their obligation under the U.C.C. to act in good faith. *See* U.C.C. § 1-203 (1978). Unlike many other provisions in the U.C.C., § 1-203 does not say "unless otherwise agreed." The parties cannot agree not to act in good faith. *See also* A. SQUILLANTE & J. FONSECA, *supra* note 18, § 2:1.

78 33 Conn. Supp. 108, 364 A.2d 1221 (1975). Under the proposed test, the decision in *Gulash* would be consistent with that in Riffe v. Black, 548 S.W.2d 175 (Ky. Ct. App. 1977). *See* note 76 *supra*.

product useful, they follow a standard procedure (modified as necessary for individual circumstances, but generally following the same pattern).

On the other hand, if the services are specialized in that they require originality or special skill, a court should deem the contract in question to be one for the performance of services, and thus not covered by Article 2.[79] In such a situation the services themselves would predominate. The "end result," the goods, would be incidental to the process or service. These services would include creative activities such as designing a system, compiling data, or providing medical services. While these types of services would often include supplying goods to make the services more beneficial, the services themselves would predominate. The goods would be standard, but the services would be creative and unique to the particular circumstances.

Under this analysis, the decisions in *Computer Servicenters*,[80] where the court held that data processing was services, *T-Birds, Inc.*,[81] where the court held that helicopter repairs were primarily services, and *Care Display*,[82] where the court held that providing a customized display booth was primarily a service, would remain the same. However, this analysis would change the decision in *Worrell*,[83] where the court found the U.C.C. covered the installation of a defective fitting on a water heater not supplied by the installer. The transaction would no longer be considered one for the sale of goods, but rather would be one in which the repair work, or services, predominated.[84]

Finally, any new test would have to allow for equitable considerations. These considerations can only be generalized. The facts and circumstances of each case are necessarily unique, and a court's mechanical application of a test can lead to restrictive decisions based on form rather than on substance. For example, the court in *Snyder*[85] admitted that services seemed to predominate in a contract for the sale and installaton of carpet, but nevertheless mechanically

79 *See* R. DUESENBERG & L. KING, *supra* note 11, § 1.03[1].

80 328 F. Supp. 653 (D.S.C. 1970), *aff'd*, 443 F.2d 906 (4th Cir. 1971); *see* note 56 *supra*.

81 540 F. Supp. 548 (E.D. Ky. 1982); *see* note 35 *supra*.

82 225 Kan. 232, 589 P.2d 599 (1979); *see* text accompanying notes 32-34 *supra*.

83 87 Nev. 204, 484 P.2d 573 (1971); *see* note 74 *supra*.

84 An aggrieved party would not be left entirely without avenues of recovery if the U.C.C. did not apply. Depending on the particular circumstances, a party might still seek recovery under a contract theory of breach of contract, or if circumstances warrant, under a tort theory of negligence, or strict liability for products. The U.C.C. is not the only remedy available in commercial circles. *See* U.C.C. § 1-103 (1978).

85 38 Md. App. 144, 380 A.2d 618 (1977).

applied the *Bonebrake* test used previously in the jurisdiction, and held the contract to be one for the sale of goods.[86] While the court acted properly in considering precedent in the jurisdiction, it could reasonably have taken note of the structure of the transaction; the contractor purchased the carpet "for the sole purpose of supplying it for installation,"[87] and under the circumstances could have held the contract to be one for the performance of services. Therefore, equitable considerations such as unique facts, reasonable expectations, and reliance could be accommodated as necessary without jeopardizing the basic consistency of decisions.

IV. Conclusion

The problem of whether Article 2 of the U.C.C. applies to a transaction arises frequently. Courts have devised four tests to solve this problem; each attempts to determine whether in mixed contracts the transaction is primarily one for the sale of goods or for the performance of services. While any of these tests can help courts make this determination, their application has not led to consistent decisions.

The proposed new test uses a three-tiered analysis, examining the intent and expectations of the parties, the nature and difficulty of the services provided, and any equitable considerations involved in the transaction. Under this proposed test, a court would treat the nature and difficulty of the services performed in the transaction as the major factor in making the goods/services determination. While this test cannot anticipate all situations or solve all problems, it would enable courts and practitioners to make the goods/services determination more simply, and it would lead to more consistent decisions.

Crystal L. Miller

86 *Id.* at 148, 380 A.2d at 621.
87 *Id.* at 147, 380 A.2d at 621.