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# Using the UCC to Defend Claims Against Engineers

Use of Article 2 of the Uniform Commercial Code (UCC) to defend claims made against engineers who design and build custom items can raise some excellent defenses not available under breach of contract or general negligence law. Since UCC Article 2, governing the sales of goods, applies, it is important to understand what constitutes a "good" under the UCC. In addition, where the claim is based on a contract that includes both design and delivery of the product, understanding how courts interpret a mixed contract is equally important. Before examining the tests used to determine if the contract is for a good or a service, it is worth examining some of the benefits and risks of the UCC. Since professional liability attorneys use the UCC infrequently, a review of the applicable law is discussed below.

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## UCC: Advantages for the Savvy and Pitfalls for the Unwary

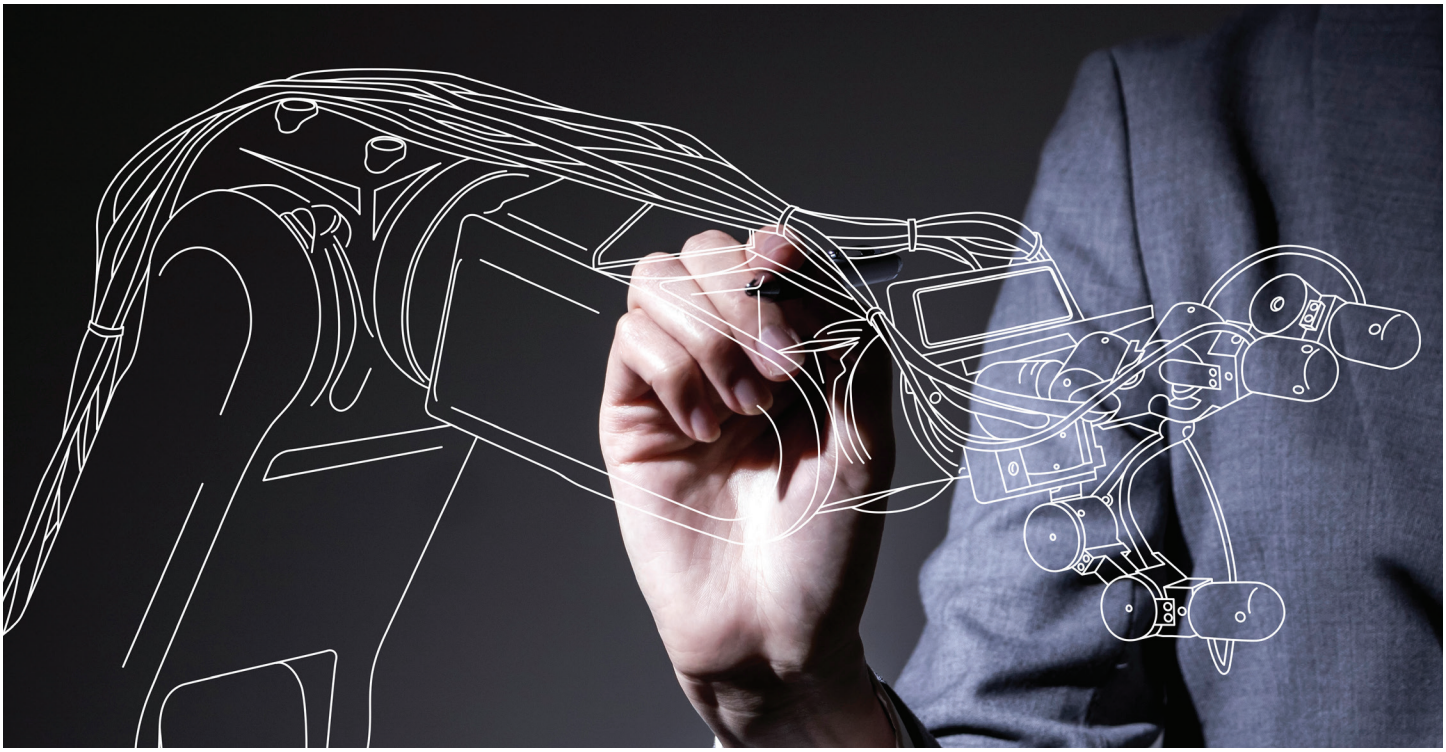
UCC claims, which can be pled in a number of ways including breach of warranty, failure to perform and failure of future performance, can trigger specific defenses not available under breach of contract or other causes of action. Plaintiffs may also attempt to avoid pleading the UCC at all and simply allege breach of contract. At that point, it will be up to the defense to identify UCC issues and respond accordingly.

For instance, where a company contracts with an engineer for a specific product, a lengthy statute of limitations (typically eight to 10 years) will apply to the written contract. However, where the contract is for a sale of goods, the UCC's shorter four-year statute of limitations will apply. The plaintiff in this scenario will argue that the UCC does not apply if the claims may be time-barred.

Damages and remedies are also impacted by the application of the UCC to sale of goods. The UCC's remedies are found in Article 2, Part 7. Depending on the specifics of delivery, acceptance and performance of the goods, among other factors, the UCC will affect damages. In many cases the damages for accepted goods will be the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. Consequential and incidental damages may also be recoverable. A thorough analysis of the possible outcomes should be considered before raising the UCC and attempting to take advantage of the available defenses. A defense may not be worth the impact on potential remedies. This is especially true where the relationship between the engineer and his or her client is governed by a contract that includes limitations on damages or remedies.

## Is the Item a "Good"?

Before moving forward under the UCC, it is important to determine if the item is a good under the UCC and if the contract is one for sale of goods. Naturally, not all engineered items qualify as "goods" that are subject to the UCC. Several jurisdictions have determined that items are "goods" if, at the time of sale, the items are moveable.[1] However, things attached to realty are rarely "goods" under the UCC, even if the items were movable at the time of sale. For instance, windows installed in a home, tiles laid permanently on the floor, or insulation systems wrapped about a structure are not considered "goods."[2] All these items were moveable at the time of the sale but once incorporated into a real estate improvement under a construction contract, the items ceased to be UCC goods.[3] One Ohio court has articulated a simple rule for determining if the item is a good or a part of the realty: things attached to realty which are not capable of severance without causing material harm to that realty are not "goods" under the UCC. That court determined that



an in-ground swimming pool was not severable from the property because removing the pool would result in a large, deep, torn-up hole; a long, narrow torn-up hole where the plumbing was buried and a torn-up deck area.[4] A material harm indeed.

## Is the Contract for Sale of Goods or for a Service?

Even after the presence of a "good" has been determined, the UCC analysis is far from complete. The UCC applies to sale of goods, not services. Typical engineering contracts are mixed goods and services contracts. For instance, where a company orders a custom engineered and manufactured item, is the contract simply for that item (a good) or for the services that go into engineering that item? Another example: an item that is purchased that has ongoing technical support of some kind. Is the purchaser buying the item or the support? The answer is probably a bit of both. Since the UCC is silent on how to treat the mixed contracts, many courts use the "predominant factor test."[5]

The typical predominant factor test for the inclusion in or the exclusion from sales provisions is whether the predominant factor and purpose of the contract is the rendition of service, with goods incidentally involved, or whether the contract is for the sale of goods, with labor incidentally involved.[6] In one of the early cases examining mixed goods and services contracts, the plaintiff builder sued a subcontractor for breach of contract relating to a contract to design and provide steel for several structures. The dispute arose before construction. The court held that the contract was one for sale of goods, not services, despite the engineering that went into designing the building. Specifically, "the fact that a specially designed product to fulfill the needs of the project was required does not negate the characterization of the transaction as a sale of goods."[7]

This outcome can be compared to other cases where the predominant purpose was found to be a service. For instance, where parties entered into a contract to supply gravel to a road project, the hauling of gravel was found to be the predominant purpose, not the purchase of gravel.[8] Similarly, where a general contractor brought suit against a mason who supplied labor and bricks after the bricks began flaking, the contract was determined to be one for masonry services.[9] The court reached this conclusion despite the purchase of the bricks being included in the contract.

At the outset of any engineering professional liability case involving the sale of goods, it is important to consider the impact of the UCC Article 2 on the litigation. Begin by determining if the contract is one for the sale of goods and if the engineered item meets the UCC's definition of a "good." Then review the UCC's applicable sections on damages and remedies in order to understand the full impact of the UCC on the litigation's end game. Finally, review the contract in detail and determine what, if any, impact the contract has upon the UCC's defenses and damages. P

1 *Fugua Homes, Inc. v, Evanston Building and Loan Company*, 370 N.E.2d 780 (1977), *S. M Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc.*, 350 N.E.2d 321 (1976), *Lakeside Bridge & Steel Company v. Mountain State Construction Company*, 400 F. Supp. 273 (1975).

2 *Weiss v. MI Home Products, Inc.*, 677 N.E.2d 442 (2007), *Kennedy v. Vacation Internationale, Ltd.*, 841 F.Supp. 986, (D.HI.1994), *Keck v. Dryvit Systems, Inc.*, 830 So.2d 1, 8-9 (Ala. 2002), *Loyd v. Ewald*, 2nd Dist. Miami No. 87-CA-33, 1988 WL 37484, (1988).

3 *Id.*

4 *Loyd v. Ewald*, 2nd Dist. Miami No. 87-CA-33, 1988 WL 37484 (1988).

5 Brush, Jesse M., *"Mixed Contracts and the UCC: A Proposal for a Uniform Penalty Default to Protect Consumers"* (2007). Student Scholarship Papers. Paper 47.

6 *Allied Industrial Service Corporation v. Kasle Iron & Metals*, 62 Ohio App. 2d 144 (1977).

7 *Belmont Industries, Inc. v. Bechtel Corp.*, 425 F.Supp. 524, 528 (E.D.Pa.1976).

8 *Heuerman v. B & M Constr., Inc.*, 358 Ill. App. 3d 1157 (2005).

9 *Zielinski v. Chris W. Knapp & Son*, 277 Ill. App. 3d 735 (1995).