Contracts I
Professor Keith A. Rowley
William S. Boyd School of Law
University of Nevada Las Vegas
Fall 2004

Optional HW Assignment #1

1. Read the attached version of Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456 (4th Cir. 1983).
   A. Based on the facts set forth in the Fourth Circuit’s opinion, make your best argument(s) that the predominant purpose of the contract was the sale of goods.
   B. Based on the facts set forth in the Fourth Circuit’s opinion, make your best argument(s) that the predominant purpose of the contract was the provision of services.
   C. If the Fourth Circuit applied the gravamen of the action test, would common law or UCC Article 2 have governed this transaction? Please explain.
   D. If the Fourth Circuit applied the gravamen of the action test, would common law or UCC Article 2 have governed this dispute? Please explain.
   E. Following remand by the Fourth Circuit, what did the district court decide was the predominant purpose of this transaction? Did the Fourth Circuit agree? Please explain and show your work.

2. Answer Problem 2 on pages 43 and 44 of your Epstein, Markell & Ponoroff casebook.

3. Suppose that Carlill v. Carbolic Smoke Ball Co., Lonergan v. Scolnick, Lefkowitz v. Great Minneapolis Supply Store, and Donovan v. RRL Corp. were governed by the U.N. Convention on Contracts for the International Sale of Goods. Would the newspaper advertisements in each case be considered offers under Article 14 of the CISG? Please explain your answer for each case separately.

4. Explain why Pepsi wins on its “only joking” defense in Leonard v. Pepsico, while the Zehmers lose despite their “only joking” defense in Lucy v. Zehmer.

5. Consider the facts of Agnew v. Great Atlantic & Pacific Tea Co. set forth on page 69 of the Epstein, Markell & Ponoroff casebook. Could Agnew successfully argue that the store breached its contract when it refused to sell him the items he desired to purchase? Please explain.

6. How does one go about revoking an offer made to the general public by, e.g., a radio or newspaper advertisement? Please explain.
7. Read the following (slightly edited) excerpt from *Sashti, Inc. v. Glunt Industries, Inc.*, 140 F. Supp. 2d 813 (N.D. Ohio 2001), and then answer the questions that follow:

   The facts show that the Defendant made a “firm offer” to the Plaintiff for the sale of goods in connection with the Plaintiff’s contract with Indian Railways. Initially, the Defendant submitted a written, signed bid to the Plaintiff on June 1, 2000. The Plaintiff asserts in its complaint that this bid was, by its own terms, irrevocable for one-hundred and twenty (120) days from the date of bid closing which was June 10, 2000. Subsequently, the Plaintiff requested more technical information from the Defendant. On September 7, 2000, the Defendant responded with that information and offered to extend its bid to January 31, 2001. Consequently, the Defendant’s extension of its bid resulted in a firm offer which it was required to keep open until January 31, 2001. The Defendant, however, withdrew its firm offer on September 28, 2000, before the Plaintiff could accept. Plaintiff now seeks to recover from Defendant based on the Defendant’s untimely revocation of its firm offer.

   A. What must be true about the Defendant (Glunt Industries) in order for UCC § 2-205 to apply to its written, signed offer? Please explain.

   B. Without knowing any more facts than those stated or alleged in the foregoing excerpt, what obvious mistake did the district court make regarding the length of time during which Defendant’s firm offer was irrevocable? Please explain.

   C. What additional fact would the Plaintiff have to establish in order to support its claim that it had until January 31, 2001 to accept the Defendant’s bid? Please explain.
COAKLEY & WILLIAMS, INC. v. SHATTERPROOF GLASS CORP.
706 F.2d 456 (4th Cir. 1983)

MURNAGHAN, Circuit Judge:

* * *

Washington Plate Glass Company had a contract “to furnish and install aluminum and glass curtain wall and storefront work”\(^1\) on a building located in Lanham, Maryland being built by Coakley & Williams, Inc., the plaintiff. To accomplish its contractual undertaking, Washington purchased the glass spandrel required from the defendant, Shatterproof Glass Corp. Other materials needed for the project, predominantly aluminum, it appears were acquired in part at least elsewhere.

The contract price under the Coakley and Washington agreement amounted to $262,500, subsequently increased by amendment to $271,350.\(^2\) The glass purchased by Washington from Shatterproof cost $87,715.00,\(^3\) with the proviso that units were “to be properly marked for field installation.”

The work progressed and the contract for the aluminum and glass curtain wall and storefront work was completed in March of 1974. Discoloration of the glass ensued, and Coakley complained. To remedy the situation, Washington agreed to replace the glass at no cost to Coakley, and did in fact replace a substantial portion of the glass. Shatterproof supplied the replacement glass and reimbursed Washington for the cost of re-installation, accomplished in April of 1977.

By December of 1977, the glass had again discolored, and complaints began to flow from Coakley to Washington and Shatterproof in or about December 1978. Shatterproof declined to replace a second time. On January 14, 1981, Coakley filed suit against Shatterproof\(^4\) alleging breach of implied warranties of merchantability and fitness for a particular purpose.…

\(^1\) The contract referred to “Spandrel glass to be 1/4” gold reflective glass with 1” rigid insulation fastened to curtain wall members approximately 1-1/2” behind glass spandrel.” In addition the agreement called on Washington to provide, inter alia: a Texas Aluminum 400 series wall system, vision glass, aluminum objects of several kinds, steel anchor clips, field fasteners, and porcelain enamel panels.

\(^2\) Of that increase of $8,850, the bulk ($8,000) reflected specification of ASG Reflectoview Tru-Therm, 1 lite coated with 20 GI Gold and temperal monolithic spandrel 1/4” 20 GI Gold to match. The remaining $850 increase was due to a change in the corner configuration from aluminum panel to 1/4” Gold Reflectiveview glass.

\(^3\) The complaint is silent as to dollar amounts assignable to the additional materials. Obviously, the more they cost, the less the amount of the contract price attributable to services…. Counsel for Coakley asserted that the evidence would show that the cost of materials was substantially in excess of the cost of installation, i.e. more than $130,000…. The plaintiff, at the early 12(b)(6) stage, is entitled to the benefit of the doubt.

\(^4\) Efforts by the defendant Shatterproof to have Washington joined as a third party defendant were stymied by involuntary bankruptcy proceedings commenced against Washington.
Whether the U.C.C. applies turns on a question as to whether the contract between Washington and Coakley involved principally a sale of goods, on the one hand, or a provision of services, on the other....

To resolve that question, we must address ourselves to a welter of cases reaching varying results depending on the considerations deemed to predominate in each particular case.\(^5\) It

\(^5\) E.g., Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (The appeal was from an adjudication on the merits, following a full trial, and reached the conclusion that a contract to supply and install bowling equipment dealt predominantly with goods, even though the amount of services involved was substantial. “The test for inclusion or exclusion [in or from the provisions of the U.C.C.] 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). The contract before us, construed in accordance with the applicable standards of the Code, is not excluded therefrom because it is ‘mixed,’ ...”); Burton v. Artery Co., 367 A.2d 935, 936, 946 (Md. 1977) (In a case where entry of summary judgment was reversed, a standard form construction contract covering “all the work and services” to complete landscaping and sodding was, bearing in mind the canon of construction opposing narrow quibbling or falsely technical construction, held to be predominantly a transaction in goods rather than services); Ranger Construction Co. v. Dixie Floor Co., 433 F. Supp. 442, 444-45 (D.S.C. 1977) (On summary judgment, without any contention that pertinent facts were in dispute, the court characterized the agreement for furnishing all labor and materials necessary to install resilient flooring as predominantly a service contract, made by a service corporation in customary construction contract language); United States v. Akron Mechanical Contractors, Inc., 308 F. Supp. 496 (D. Md. 1970) (Here the case proceeded to the summary judgment stage. The facts were stipulated, eliminating any possibility of elaboration or resolution of conflicts of fact. The case concerned a building subcontract for plumbing, heating, ventilating and air conditioning work. It was agreed by the parties that the contract covered installation of complete systems and not merely the sale of the constituent materials. The furnishing of materials being incidental to the construction activities, the then applicable Uniform Sales Act was deemed not to apply to the transactions. The real point in the case was whether title was retained or passed, and title was found to have passed. Such a conclusion would be consistent with a contract either for goods or for services, so the decision is not relevant to the problem we confront); Snyder v. Herbert Greenbaum and Associates, Inc., 38 Md. App. 144, 147-48, 380 A.2d 618, 621 (1977) (Here the appeal followed a full trial on the merits. The contract was to supply and install carpeting and the underlying carpet pad in a large group of apartments. The court held: “Despite this difference in the facts which tend to favor the service purpose of the contract, application of the Bonebrake test leads us to conclude that the primary thrust of this contract is the sale, rather than the installation, of the carpet. Therefore, the Sales Title [of the Uniform Commercial Code] applies to this contract.”); Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 580 (7th Cir. 1976) (A designer, fabricator and engineer undertook to construct a one-million gallon water tank. In holding the transaction to be a sale of goods, not services, the court had this to say: “We find ample support in the cases arising under the UCC itself that the scope of coverage of ‘goods’ is not to be given a narrow construction but instead should be viewed as being broad in scope so as to carry out the underlying purpose of the Code of achieving uniformity in commercial transactions.... In the words of the UCC this was a ‘movable’ ‘thing’ ‘specially manufactured.’ That which PDM agreed to sell and Brookhaven agreed to buy was not services but goods as defined in the UCC.” The decision came following a full trial, and affirmed an award of a judgment n.o.v.); Van Sistine v. Tollard, 291 N.W.2d 636, 638-39 (Wis. 1980) (After a full exploration, in a trial, of pertinent facts, the contract was deemed to be predominantly for supply of services, not of goods, relying on the supplier’s self-description as a contractor, the fact that over half of the monetary value was attributable to labor, with some materials furnished by the buyer. The decision was influenced by the court’s disenchantedment with a U.C.C. provision making a check in payment marked “paid in full” insufficient to its stated purpose where the payee cashed the instrument with an “under protest and without prejudice” endorsement); Meyers v. Henderson Construction Co.,
should not pass unnoticed that all were decided at summary judgment or beyond. No case involving the issue appears to have been disposed of at the Rule 12(b)(6) or demurrer stage. They emphasize, in particular, three aspects which may, or may not, constitute indicia of the nature of the contract: (1) the language of the contract, (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials involved.

A distillation of the cases outlined in the foregoing notes produces an inescapable conclusion that, on the facts … a reasonable viewing of them would permit a factfinder to conclude that the contract between Washington and Coakley predominantly concerned a sale of goods, and consequently was governed by the U.C.C. A Rule 12(b)(6) motion simply cannot serve to dispose of the case.

As to the first of the emphasized aspects, the contract between Washington and Coakley speaks in terms of furnishing and installing a wall and performing storefront work. Clearly, at the very outset of performance Washington had the responsibility to bring to the affected premises the materials which ultimately would form the glass curtain wall and store front. The U.C.C. in § 2-105 defines “goods” as “all things (including specially manufactured goods) which

370 A.2d 547, 550 (N.J. Super. Ct. App. Div. 1977) (A contract to furnish labor, materials (including glass purchased and mounted), tools and equipment for installation of overhead doors was, following a hearing on summary judgment, found to be predominantly for goods, not services, and so covered by the U.C.C.); Air Heaters, Inc. v. Johnson Electric, Inc., 258 N.W.2d 649, 652 (N.D. 1977) (On the basis of facts established in a full scale trial on the merits, a contract to design, manufacture, and install a complete electrical distribution system was scrutinized to determine whether it was predominantly for goods or predominantly for services. The court concluded that the plaintiff, the party on whom the burden lay to establish that the agreement was predominantly for a sale of goods simply failed to meet the burden at trial. “In this case we are not able to determine from the record whether the predominant factor and thrust of this contract is the rendition of services, or a transaction of sale. The record does not include enough factual data concerning this particular contract for us to make that determination.” The import of the decision was largely eradicated by a conclusion that, even outside the U.C.C., North Dakota law afforded a right to recover for breach of an implied warranty of fitness. Hence the outcome of the case was unaffected by the “goods or services” discussion); Cork Plumbing Co. v. Martin Bloom Associates, Inc., 573 S.W.2d 947, 950, 958 (Mo. Ct. App. 1978) (A judgment in the trial court, entered following a full-scale trial, was affirmed. Contracts were held to be predominantly for services which called for (a) completion of plumbing and sewer work in 176 apartment units and (b) plumbing work to be done on a clubhouse in the apartment complex. The character of the agreements as “construction contracts” appears to have influenced the decision.)

6 Bonebrake v. Cox, 499 F.2d at 958 (“The language thus employed is that peculiar to goods, not services. It speaks of ‘equipment,’ and of lanes free from ‘defects in workmanship and materials.’ The rendition of services does not comport with such terminology.”); Ranger Construction Co. v. Dixie Floor Co., 433 F. Supp. at 445 (“It is interesting to note that throughout the contract the defendant, Dixie Floor Co., Inc., is not referred to as a materialman but rather as a subcontractor.”).

7 Ranger Construction Co. v. Dixie Floor Co., 433 F. Supp. at 445 (“The defendant’s responses to interrogatories indicated that the defendant was essentially a service corporation engaged in the installation and construction of flooring.”).

8 Snyder v. Herbert Greenbaum & Associates, Inc., 38 Md. App. at 156-59, 380 A.2d at 626-27 (The case recognizes that the U.C.C. contemplated as a seller of goods one who obtains the component parts for special assembly, yet who, upon breach of the other party, is restricted to realization of junk value. It reached its decision that a sale of goods, not a provision of services, was involved though neither party “in any sense proved the amount of the resale proceeds of the carpet.”).

Coakley-3
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 (Title 8) and things in action.” That at least creates
an uncertainty to be resolved only by a full factual presentation to determine whether the nature
of the Washington business was predominantly the provision of goods or the furnishing of
services. The fact that Coakley was a building contractor specializing in construction is not
sufficient to provide a completely definitive answer. While often, and perhaps customarily, a
contractor is engaged in the provision of services, the scope of a contractor’s work is not
necessarily monolithic and, in the present circumstances, it becomes a question of unresolved
fact whether Coakley, for the purposes of the single relationship to which we are restricted, was a
buyer of goods.

In this connection, it is not irrelevant that Coakley has alleged that the purchases by
Washington from Shatterproof included anchor clips and field fasteners. At the early stage at
which we find ourselves, the allegation requires us to indulge the inference urged by counsel for
Coakley that putting the glass in place was a simple snap-on process requiring little expenditure
of time or labor. One can readily imagine, without the advantage of specificity deriving from a
full trial on the merits, that the contract largely contemplated the provision of pre-cast panels as
goods, without the installation being nearly so extensive or significant as the supplying of the
glass itself.

The fact that the contract does not follow a standard, routine or regularized form, coupled
with the plaintiff’s contention that standard form contracts are virtually universal for
construction (i.e., generally, service) contracts, operates to leave open the possibility of a finding
that the contract is more one for goods than would be the customary construction contract.

Turning to the second point, the nature of Washington’s business, the fact that
Washington was a dealer and not a manufacturer does not have any particularly dispositive
significance. Many retailers of goods function in the role of middleman. Shatterproof sold
Washington materials in a transaction which unquestionably, on the sparse record before us at
the preliminary stage at which we find ourselves, was a sale of goods, and the question comes
down essentially to whether those materials or the services which Washington also provided
under its contract with Coakley predominated. Without full consideration of as yet unascertained
facts that question is simply not ripe for resolution. It is one of fact, not law; at least it is at this
early stage.

Third, the complaint affords no realistic, and certainly no dispositive, information as to
the value of the spandrels et al. in case of breakup into the component parts of the glass curtain
wall and store front work. That can only be determined by further development of the record,
and is, in all events, but one of several factors which must be evaluated in conjunction with all
the others in resolving the ultimate factual issue: did Washington and Coakley deal primarily
with goods or services?

---

9 Although the contention is not spelled out in the complaint, notice pleading does not require such
specificity. From what else is pleaded, and from the issues framed, manifestly the relevance of the character of
ordinary construction contracts was such as to call for an inquiry as to which diligent counsel for Shatterproof had
adequate notice.
Accordingly, Coakley has alleged enough to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Nor, at the other extreme, has it alleged too much, permitting sure ascertainment that services, not goods, were the gravamen of the transaction. Coakley should, therefore, be permitted to show, unless the statute of limitations bars recovery, that it was a buyer of goods and, therefore, entitled to proceed under the U.C.C. provisions.¹⁰

* * *

Accordingly, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

¹⁰ Following argument on January 13, 1983 of the instant case, the Maryland Court of Appeals, on January 25, 1983, handed down its decision in *Anthony Pools, a Division of Anthony Industries, Inc. v. Sheehan*, 455 A.2d 434 (Md. Ct. App. 1983). That case involves the somewhat different, although related, question of whether, in the case of a hybrid goods and services transaction, a disclaimer of an implied warranty of merchantability was unenforceable, as to the goods component of a contract predominantly for services, because such disclaimers are not legally permitted where there is a sale of consumer goods. U.C.C. § 2-316.1. The disclaimer was held unenforceable on the grounds that consumer goods retained their status as goods despite the fact that the contract was predominantly for services. The all or nothing contention that, the contract being predominantly one for services, none of the items covered by it should be treated as goods was rejected.

The Maryland Court of Appeals expressly reserved judgment as to whether U.C.C. § 2-316.1’s ban on implied warranty disclaimers would also extend to consumer goods used up in the course of rendering the consumer service. At the very least, the result in Anthony Pools does nothing to question the soundness of the conclusion we have reached.