Chapter 2. Introduction to UCC Article 2

2.1. Scope of Article 2: Transactions in Goods. Article 2 of the Uniform Commercial Code applies to *transactions in goods*. § 2-102.

2.1.1. One of the purposes of this class is to teach you how to read and use statutes. In some areas of law, such as torts, you rely more heavily on case law than on statutes in giving advice and coming to conclusions. "Sales of goods" is an area of law where you must learn to *begin with the statute* and the *Official Comments*. Note that while the Official Comments are extremely valuable for purposes of interpretation, in most jurisdictions they have not been enacted by the legislature and are only persuasive authority. Cases become important when a particular UCC provision is subject to more than one interpretation.

2.1.2. You can seldom rely on a single statute when applying the UCC. In applying a particular provision of Article 2, you often have to refer to other provisions of Article 2, or to the general provisions of Article 1. Always look at any applicable *definitions*, which may be in Article 1 or Article 2, and at the *cross-references* to other UCC sections that are contained in or immediately follow the provision you are reading.

2.1.3. Article 2 applies to "transactions in goods." § 2-102. Article 2 does not apply to transactions involving real property or services. Our first step is to determine what constitutes a "good" under Article 2.

[2-1—2-5]

2.2. Mixed Transactions. Article 2 does not apply to contracts for services or contracts for land, intangibles, or other items that are not "goods." Often a contract involves either both goods and services (such as the sale and installation of carpet), or

both UCC goods (cattle) and non-UCC property (ranch land). In a mixed transaction, the courts have developed two different tests to determine whether or not the transaction is within the scope of Article 2.

2.2.1. The majority of jurisdictions have applied ***the predominant factor test***. A well-known case, *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974) enunciated this test as follows:

> The test for inclusion or exclusion is ... whether their predominant factor, their thrust, their purposes reasonably stated, is the rendition of service with goods incidentally involved (e.g., contract with artist for painting) or is it a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

2.2.2. In *Pass v. Shelby Aviation, Inc.*, 2000 Tenn. App. LEXIS 247, an airplane was brought in for a required inspection. The mechanics failed to install some bolts, resulting in an accident. Having missed the statute of limitations for negligence, which is 3 years, the plaintiffs sought to bring a claim for breach of express and implied warranties under the UCC, which has 4 year statute of limitations. The court enunciated four factors to look at in determining whether the contract was predominantly for goods, or predominantly for services:

- the language of the parties' contract (*i.e.*, whether it focused on goods versus services);
- the nature of the business of the supplier (is this a person who regularly sells goods, or rather provides services);
- the reason the parties entered into the contract (what was bargained for B goods or services); and
- the respective amounts charged under the contract for goods and for services.

No one factor alone is conclusive. For example, even where the cost of goods exceeds the cost of services, the predominant purpose may still be deemed the provision of services where the other factors support such a finding. Applying these factors, the appellate court determined that the predominant purpose of this particular contract was the provision of services rather than the sale of goods, and thus plaintiff could not assert breach of warranty claims under Article 2.

2.2.3. Not all courts apply the same factors. See, for example, *Colorado Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384, 1388-89 (Colo. 1983), which defined the factors as: (1) the contractual language used by the parties; (2) whether the agreement involves one overall price that includes both goods and labor or, instead, calls for separate and discrete billings for goods on the one hand and labor on the other; (3) the ratio that the cost of

goods bears to the overall contract price; and (4) the nature and reasonableness of the purchaser's contractual expectations of acquiring a property interest in goods.

2.2.4. A minority of courts apply ***the gravamen test*** in determining whether a particular transaction is subject to Article 2. This test focuses on whether the gravamen of the action involves goods or services. A well-known case applying this test involved a lady who sued a beauty salon where she had received a permanent. The permanent solution was defective, and caused considerable damage to her hair and scalp. Under the predominant factor test, most courts would find (as the trial court did) that the predominant purpose of the contract was services, and thus not subject to Article 2. But the New Jersey Supreme Court concluded that because the gravamen of her claim was the defective goods, Article 2 applied. *Newmark v. Gimbel's Inc*., 258 A.2d 697 (N.J. 1969). Other courts which have applied the gravamen test include: *Anthony Pools v. Sheehan*, 455 A.2d 434 (Md. 1983) (plaintiff slipped on pool diving board; court held UCC applied to predominantly services contract for installation of diving board because gravamen of action was alleged defect in diving board); *H. Hirschfield Sons, Co. v. Colt Industries Operating Corp*., 309 N.W.2d 714 (Mich. App. 1981) (court held that UCC does not apply to contract for sale of railroad and truck scale because action alleged defects in the installation of scale, not in the scale itself); *Providence Hospital v. Truly*, 611 S.W.2d 127 (Tex. Civ. App. 1980) (contaminated drug was injected into plaintiff's eye during cataract surgery; court held UCC applies in action alleging breach of warranty of fitness of goods sold for particular purpose).

Under the gravamen test, a single contract could be subject to two different bodies of law: UCC law for any claim involving the goods, and non-UCC law for any claim relating to the services. Is this troublesome? Not if you would get to the same result regardless of the law implied. But where the laws differ (and they often do regarding important issues such as the statute of limitations, the statute of frauds, warranties, and other areas of law), this may be troublesome to a court.

2.2.5. Most "mixed transactions" involve goods and services. In other contracts the "mixture" relates to goods and real property or intangibles, such as intellectual property. What body of law would govern in the event of a breach? Once again, courts will apply either the "predominant factor" test or "gravamen" test, even though those tests were developed in the context of goods/services contracts. Some of the factors of the "predominant factor" test don't easily apply, leaving the cost of the items involved as the most influential factor. Compare *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 13-14 (1st Cir. 1987), which held that Article 2 governed the sale of a construction company's equipment, inventory, and uncompleted construction contracts where "most of the significant terms" and 98% of the purchase price related to the sale of goods; and *Fink v. DeClassis*, 745 F. Supp. 509, 515-16 (N.D. Ill. 1990), finding that Article 2 did not govern

the sale of a company's beauty care product lines where the goods (machinery, equipment, and inventory) constituted only 17% of the purchase price, which also included such intangible assets as "tradenames, trademarks, logos, advertising, artwork, customer lists, sales records, unfulfilled sales orders, goodwill, and licensing agreements."

2.2.6. Drafting Point: Under the principle of freedom of contract, and subject to the choice of law provisions of § 1-301, the parties can agree to choose the law applicable to the contract. For example, if you draft a "mixed transaction" contract, you can avoid the "predominant factor" test by specifying that UCC law applies to all claims relating to the goods, and non-UCC law to all other claims. Query: can you choose the UCC to govern all claims arising under the "mixed transaction" contract, including, for example, claims relating to services or to intellectual property? What danger might there be in attempting to apply the UCC to all potential claims arising under a contract?

[2-6—2-7]

2.3. The Article 2 "Merchant" Rules. As we have seen, Article 2 applies to transactions in goods. If a sale of goods is within Article 2, in general it doesn't matter whether the transaction is between sophisticated or unsophisticated parties. Article 2 covers Bic's sale of 2 million pens to Wal-Mart, Wal-Mart's sale of a package of six Bic pens to me, and my sale of one pen to you.

However, there are a few occasions (thirteen to be exact), where Article 2 contains a rule that applies only to merchants or only "between merchants." If the rule applies to a merchant, then only that party has to be a merchant, but if the rule applies "between merchants," then both parties have to be merchants for the rule to kick in. See § 2-104(3).

2.3.1. What does it mean to be a merchant? As you can imagine, when a rule applies to a merchant, it is generally because the merchant is more sophisticated in business matters and may be held to a higher standard of diligence. How does the merchant obtain that sophistication? Let's turn to the definition of merchant at § 2-104(1). The UCC distinguishes between *merchants as to goods* and *merchants as to practices*.

2.3.2. Under § 2-104(1), a merchant falls into the class of a merchant *as to goods* in one of three ways:

- A person who *deals in goods of the kind*;
- A person who, *by his occupation* (and not by hobby) holds himself out as having knowledge or skill peculiar to the goods involved (for example, an automobile parts dealer, although he doesn't deal in cars, may nonetheless be a merchant as to cars because *by his occupation* he has special knowledge of car parts and car maintenance (see *Fay v. O'Connell*, 1990 Mass. App. Div. 141);

- A person who employs an agent who, *by the agent's occupation*, holds himself out as having knowledge or skill peculiar to the goods involved (see *Swift Freedom Aviation, LLC v. R.H. Aero*, 2005 U.S. Dist. LEXIS 37261 (E.D. Tenn. 2005)).

2.3.3. There are three important Article 2 sections which apply only to *merchants as to goods*:

1. The most important by far relates to the *implied warranty of merchantability* under § 2-314, which applies only to "merchants with respect to goods of that kind."

2. The power to transfer title in an *entrustment* situation applies only to a "merchant who deals in goods of that kind." § 2-403(2). For example, if you entrust your snowboard to a ski shop for waxing, and the shop (which sells skis) mistakenly sells the snowboard, a buyer in the ordinary course of business will obtain good title.

3. Under § 2-312(3), a merchant dealing in goods of the kind gives a warranty that the goods are free of infringement claims.

2.3.4. Case: *Cook v. Downing*

Cook v. Downing

Court of Appeals of Oklahoma
December 20, 1994

Iris D. COOK, Appellee, v. Dr. Bryan DOWNING, Appellant. No. 82669. 891 P.2d 611. Released for Publication by Order of the Court of Appeals of Oklahoma, Division No. 1. Dated Dec. 20, 1994. Certiorari Denied Feb. 22, 1995. STEWART M. HUNTER, J., wrote the opinion in which HANSEN, P.J., concurred; CARL B. JONES, J., dissented with a separate opinion.

STEWART M. HUNTER, Judge:

Appellant is a licensed dentist who devotes less than 50% of his practice to fitting and making dentures. Appellee, a patient, sued Appellant in small claims court because of mouth trouble she had on account of the dentures. Appellee alleged the condition was the result of ill-fitting dentures. Appellant testified that the condition was generalized and not consistent with localized sore spots which would result from ill-fitting dentures. Appellant referred Appellee to oral surgeons. The dental specialists' evidence showed that they believed the condition was due to either candidas, an autoimmune reaction or an allergy to the dental material. Although none of the dental evidence pinpointed the source of the problem, it consistently ruled out ill-fitting dentures.

After trial, the court entered judgment in favor of Appellee, setting forth that damages were awarded pursuant to Article 2 of the Oklahoma Uniform Commercial Code, (UCC), 12A O.S.1991 §§ 2–104, 2–105 and 2–315, "Implied Warranty of Fitness for a Particular Purpose" and that attorney fees were awarded pursuant to 12 O.S.1991 § 936. 12A O.S.1991 § 2–104(1) defines *merchant* as "a person who deals in the goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." Section 2–105(1) defines *goods* as meaning "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 ..." The law of implied warranty in the commercial code is found in § 2–315 which states:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

We agree with Appellant's position that any claim Appellee might have sounds in tort. In Oklahoma, dentists, professionals who are regulated by the state, furnish dentures. 59 O.S.1991 § 328.19. In general, dentists must use ordinary skill in treating their patients. A patient does not establish the elements of legal detriment by only showing nonsuccess or unsatisfactory results. *Goodlett v. Williamston*, 179 Okl. 238, 65 P.2d 472, 473 (1937) (syllabus by the Court).

A dentist is not a merchant and the Uniform Commercial Code is not the law to apply to these facts. Finding no Oklahoma law on point, we align ourselves with the reasoning stated by the Court of Appeals of North Carolina in *Preston v. Thompson*, 53 N.C.App. 290, 280 S.E.2d 780 (1981). In the *Preston* case, the patient determined through her research in the yellow pages that the dentist was a specialist in dentures. The patient claimed the doctor made oral assurances that the dentures would fit satisfactorily. The dentures did not fit well and subsequent attempts at correcting the problem were not successful. The patient sued the dentist on an implied warranty theory pursuant to the Uniform Commercial Code. The court held, 280 S.E.2d at 784, that the transaction was not of "goods" and that a dentist was not a "merchant" under

the UCC. We adopt the rule as enunciated by the North Carolina court, 280 S.E.2d at 784, that "those who, for a fee, furnish their professional medical services for the guidance and assistance of others are not liable in the absence of negligence or intentional misconduct." (citation omitted). The court further held, 280 S.E.2d at 785, that "the fact that defendant holds himself out as specializing in the preparing and fitting of dentures does not remove him from the practice of dentistry and transform him into a merchant." We hold that under the laws of Oklahoma, a dentist is not a merchant and dentures, furnished by a dentist, are not goods under the UCC.

A dentist could be sued for breach of contract, if such contract were alleged to exist, but that is not the fact as revealed in the record in our case. Appellee presented evidence of an advertisement guaranteeing dentures to fit, but testified that she did not see this ad until after she had begun her treatment with Appellant. The evidence does not support any breach of contract action.

As a matter of law, Appellee erroneously based her cause of action on the Uniform Commercial Code rather than negligence. The court erred in entering judgment in favor of Appellee based on this law. For this reason, we reverse the judgment of the trial court and remand the matter with directions to enter judgment in favor of Appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

CARL B. JONES, Judge, dissenting:

As is typical of small claims cases, there were no pleadings here to define the issues. At trial, however, issues were raised as to dental malpractice and breach of implied warranties under the UCC. Although the trial court based its decision on a finding of a breach of the implied warranty of fitness for a particular purpose, 12A O.S.1991 § 2–315, the trial court's decision must be affirmed if sustainable on any ground. *Benham v. Keller,* 673 P.2d 152 (Okla.1983); *Thompson v. Inman,* 482 P.2d 927 (Okla.1971).

The decision cannot be affirmed on the basis of professional negligence as the necessary evidence of such negligence was lacking. But neither can the trial court's decision's be affirmed on the basis of implied warranty of fitness for a particular purpose. There was no particular or special purpose involved as is required by § 2–315.

"A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses

which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains." 12A O.S. § 2–315 (Uniform Commercial Code Comment No. 2); *Crysco Oilfield Services, Inc. v. Hutchison–Hayes International, Inc.*, 913 F.2d 850 (10th Cir.1990) (The use of a good in the ordinary manner for which it was manufactured does not satisfy the requirement of 12A O.S. § 2–315 that the good is to be used for a particular purpose.)[5]

The use Appellee was to make of the dentures was their ordinary use, and that they may not have been suitable for the ordinary purpose for which they were to be used is the concept of "merchantability".

The implied warranty of merchantability is codified at 12A O.S.1991 § 2–314 and deserves a closer look.

> "(1) ... a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. * * * *
>
> (2) Goods to be merchantable must be at least such as ...
>
> (c) are fit for the ordinary purposes for which such goods are used; * * * * ".

A "merchant" is defined as:

> "... a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." 12A O.S.1991 § 2–104(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 ... and things in action. * * * * ". 12A O.S.1991 § 2–105(1)."Dentists" and "dentures" appear to be included in the definitions of merchants and goods.

The transaction of a patient being fitted for and purchasing dentures from a dentist is actually a hybrid. It is not purely a sale of goods by a merchant, nor is it purely the providing of a service by a health care professional. Whether implied warranties under Article 2 of the U.C.C. apply to such a transaction should depend on whether the predominant element of the transaction is the sale of goods or the rendering of services. If the sale of goods predominates, it would be within the scope of Article 2 and the implied warranties contained therein. However, if the service aspect predominates, there would be no implied warranties. *See* 5 A.L.R.4th 501 (1981).

Although the record contains no specific findings of fact, the record does contain evidence from which it could be concluded that this transaction was principally a sale of goods and that the implied warranty of merchantability applies thereto. The evidence was also sufficient that the trier of fact could have concluded that the dentures were not fit for their ordinary purpose as required to establish a *prima facie* case for breach of the implied warranty of merchantability. We must affirm a law action tried to the court if there is any competent evidence to support the judgment. *United Engines, Inc. v. McConnell Const. Inc.*, 641 P.2d 1101 (Okla.1980).

In contemporary society the old distinctions separating health care professionals from other businessmen are blurring in many respects. This Court's holding that a dentist is *not* a merchant, and dentures, furnished by a dentist, are *not* goods ignores the fact that nothing excludes them from the statutory definitions of merchant and goods. It also ignores the fact that health care professionals in some instances *are* selling goods to their "patients", with the providing of professional services being secondary to the sale. To such transactions there is no reason Article 2 of the UCC should not apply.

I respectfully dissent.

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[2-8—2-10]

2.4.4. Section 2.4.3 notes certain Article 2 "merchant" provisions that apply only to merchants in goods. Other merchant rules apply to both merchants in goods and merchants as to practices. It is much easier to fall into the class of *merchants as to practices*. This definition focuses on a person's familiarity with general business practices, and according to § 2-104, Comment 2, would include "*almost every person in business*." (emphasis added) A person falls into this class by one of two means:

1. A person who, *by his occupation* (and not by hobby) holds herself out as having knowledge or skill peculiar to the practices involved; or

2. A person who employs an agent who, *by the agent's occupation*, holds herself out as having knowledge or skill peculiar to the practices involved (such as a university that hires a purchasing agent familiar with general business practices to acquire equipment and supplies for the university).

Important exclusion: Comment 2 states that the Article 2 sections providing special rules for merchants as to practices *only applies* to a merchant in his mercantile capacity; the special rules *do not apply* when a merchant is buying goods for his *personal use*.

[2-11—2-12]

2.4.5. You need to carefully read each Article 2 provision to determine to whom it applies. Although most Article 2 rules apply regardless of whether either party is a merchant, several Article 2 rules are limited in their application, depending upon one or both parties' status as a merchant as to goods or practices. In addition to the three rules that apply only if a party is a merchant as to goods as noted at Section 2.4.3, following are examples of rules whose application depends upon the merchant status of one or both parties.

1. The § 2-201(2) written confirmation exception to the statute of frauds applies when *both* parties are merchants, as indicated by the language "[b]etween merchants."

2. Section 2-207(2) regarding the "battle of the forms" allows additional terms to become a part of the contract when both parties are merchants, if certain requirements are met.

3. Section 2-209(2) requires a "no oral modification clause" on a form supplied by a merchant to be separately signed or initialed, *unless* both parties are merchants (in which case the "no oral modification clause" does not need to be separately signed or initialed).

4. Section 2-205 provides that an offer by a merchant to *buy or sell* goods may become irrevocable without consideration if certain requirements are met. Only the offeror needs to be a merchant.

5. As discussed in Chapter 1, Section 1.4, the obligation of "good faith" applies to merchants and nonmerchants alike, but the pre-2001 version of UCC Articles 1 and 2 (which still exists in several jurisdictions) applies a higher standard to merchants versus nonmerchants.

6. Under § 2-509, if the seller is a *merchant as to goods or practices*, the risk of loss passes to the buyer when the buyer receives the good. If the seller is a nonmerchant, the risk of loss passes to buyer on tender of delivery.

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