Advisory

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Know Thy Product: Are You Transacting in "Goods" Under the Uniform Commercial Code?

Recent decisions from the United States District Court for the Southern District of New York and the Connecticut Appellate Court revisit a familiar yet sometimes perplexing question: Am I transacting in "goods" under the Uniform Commercial Code ("UCC") or dealing with "services"? Often, the answer is straightforward enough particularly in the world of widgets. How about electricity and software licenses? Are they goods? And, if so, what does that mean? As discussed below, knowing the answer could mean the difference between winning and losing your case.

On September 16, 2013, the Southern District of New York wrestled with the problem of whether electricity is a "good" under the UCC. *In re Great Atl. & Pac. Tea Co.,* No. 12-CV-7629 (CS), 2013 WL 5212141 (S.D.N.Y. Sept. 16, 2013). At issue was a creditor claim for nearly $1 million, which would be given administrative priority in the Bankruptcy Court assuming electricity qualified as a good, not a service. Preferring lab coats over argument, the District Court held on appeal that testimony was necessary before deciding the question. "I simply need to know more about the delivery of electricity in this case," wrote Judge Cathy Seibel, in remanding the matter back to the Bankruptcy Court for an evidentiary hearing. The Court reasoned that "while the physics of electricity may be constant, the instant case demonstrates that economic or business arrangements for its delivery are not." Some firms generate, sell, deliver and/or service electricity, while others buy electricity from generators and resell it at a premium. Lacking information about the specific way this particular electricity was used, bought and sold, the District Court vacated the bankruptcy decision that electricity was not a good and remanded the case for an evidentiary hearing.

On October 1, 2013, the Connecticut Appellate Court also addressed the meaning of goods versus services in *W. Dermatology Consultants, P.C. v. VitalWorks, Inc.*, No. 32051, 2013 WL 5313973 (Conn. App. Oct. 1, 2013). In this software license case, the plaintiff dermatological practice purchased software licenses, hardware, installation and training services, and ongoing support from the defendant. Plaintiff claimed the software did not function as advertised, and sued under various theories, including breach of contract. Regardless of the functionality of the software, the Appellate Court concluded that software licenses are "goods" under the UCC and because the UCC demands pre-suit notice of a claim (which plaintiff never gave), the Appellate Court reversed and directed entry of judgment in favor of defendant.

Electricity and software are two examples of "goods" that play on the margins. And both cases above demonstrate the significance of knowing your product. The following is a non-exhaustive list of what other courts have found as "goods" under the UCC.

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oil; minerals; natural gas; water; growing crops; unborn young of animals; timber; structures to be removed from land; chemical products; computers; motor vehicles; mobile homes; aircraft; boats; windows; fertilizer; feed; works of art; blood; carpeting; prescription drugs; video games; money not used as medium of exchange; radio transmitters; protective roof coating; scrap metal; and wastewater treatment systems.

In sum, regardless of where your product falls on the spectrum of goods versus services, *In re Great Atlantic and W. Dermatology Consultants, P.C.* remind us that knowing thy product is an essential part of client counseling.