Michigan Law Review

Volume 65 | Issue 7

1967

Government Contracts-Adoption of Uniform Commercial Code as the Applicable Federal Law in an Action for Breach of Government Contract-*United States v. Wegematic Corp.*

Michigan Law Review

GOVERNMENT CONTRACTS—Adoption of Uniform Commercial Code as the Applicable Federal Law in an Action for Breach of Government Contract—*United States v. Wegematic Corp.**

Appellant contracted to supply the Federal Reserve Board with a "truly revolutionary" electronic digital computing system. After twice requesting postponement of the delivery date, appellant informed the Board that delivery under the terms of the contract would be impracticable because of unforeseen engineering difficulties that would require at least one year and one million dollars to overcome. Appellant asked for cancellation of the contract, but the Board refused and brought a suit for damages. Both parties conceded that federal law governed the action; appellant, however, argued that section 2-615 of the Uniform Commercial Code (Code) should be adopted as the controlling federal law of sales. This section excuses a default on a contract when the failure of presupposed conditions makes performance impossible.[1] The federal district court rendered judgment for the United States. On appeal to the Second Circuit, the court adopted section 2-615 of the Code as the controlling federal law, but *held*, affirmed. Section 2-615 of the Code does not relieve appellant from a default when appellant has promoted its product as a revolutionary breakthrough, expressly agreed to liquidated damages in case of late performance, authorized the Board to resort to other manufacturers in the event of non-delivery, and has not presented sufficient evidence of the failure of presupposed conditions.

The court's adoption of the Code as the controlling law represents an attempt to make the law applicable to federal contracts compatible with current commercial practice. The number of federal government contracts has been steadily growing as a result of both the constant expansion in the scope of government activities and the express federal policy favoring the dispersal of government contracts

* 360 F.2d 674 (2d Cir. 1966) [hereinafter cited as principal case].

1. See UNIFORM COMMERCIAL CODE § 2-615 and comment [hereinafter cited as U.C.C.].

among small businesses.[2] Thus, two questions have become increasingly significant: (1) whether to construe these contracts according to federal or state law; (2) if federal law is to be applicable, what sources should the courts draw on to determine the substance of that law.

It is clear that federal law applies where there is both a federal statute or regulation governing the activity at issue[3] and a congressional intent that this statute or regulation should be construed under a uniform federal rule.[4] Unfortunately, Congress has not manifested any such intent with respect to the construction of government contracts. Nevertheless, federal courts have generally come to hold that federal law is applicable in federal government contract cases.[5]

The problem of choice of law in government contract cases is an outgrowth of the *Erie*[6] decision in which the Supreme Court cast doubt on the power of the federal courts to declare the federal law as governing, even when a valid federal program is involved.[7] The effect of *Erie* on federal contract cases was unclear: in the five years following the decision, the federal courts could not agree as to whether state or federal law controlled. The question was somewhat clarified when the Supreme Court ruled on a related issue in *Clearfield Trust Co. v. United States.*[8] In that case the court held that the government's rights and duties on the commercial paper it issues are to be measured by federal law. The sweeping language of this opinion led to a resurgence in the application of federal law in cases involving established federal functions, including government contract cases.[9]

---

2. *E.g.*, 64 Stat. 815 (1950), as amended, 50 U.S.C. § 2151(d) (1964). See also Pfocher, *The Choice of Law, State or Federal, in Cases Involving Government Contracts*, 12 LA. L. REV. 37 (1951).

3. *E.g.*, United States v. Shimer, 367 U.S. 374 (1961) (regulation); Sola Elec. Co. v. Jefferson Co., 317 U.S. 173 (1942); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942); Deitrick v. Greaney, 309 U.S. 190 (1940) (statutes).

4. *E.g.*, Lyeth v. Hoey, 305 U.S. 188 (1938); United States v. Lambeth, 176 F.2d (9th Cir. 1949). Although these two rules may appear to be similar, there have been instances in which the Supreme Court has concluded that Congress intended state law to be applicable despite the existence of a federal statute regulating the activity concerned. *E.g.*, Helvering v. Stuart, 317 U.S. 154, *modified*, 317 U.S. 602 (1942).

5. See note 16 *infra*.

6. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). Mr. Justice Brandeis declared in a now famous dictum: "There is no general federal common law."

For discussions that include the topic of the law to be applied in federal government contracts cases, see Friendly, *In Praise of Erie—and of the New England Common Law*, 39 N.Y.U.L. REV. 383 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 [hereinafter cited as Mishkin]; Reifenberg, *Common Law—Federal*, 30 ORE. L. REV. 164 (1951); 59 HARV. L. REV. 966 (1946). Contrary to Mr. Justice Brandeis' opinion in *Erie*, these authors have concluded that there is in fact a substantial body of federal common law.

7. See Mishkin 799–801.

8. 318 U.S. 363 (1943). See WRIGHT, FEDERAL COURTS § 60 (1963); Mishkin 828–32.

9. See, *e.g.*, United States v. Allegheny County, 322 U.S. 174 (1944); Pack v. United States, 176 F.2d 770 (9th Cir. 1949). See also American Pipe & Steel Corp. v. Firestone

Since *Clearfield,* the federal courts have generally applied federal law in government contract cases.[10] This tendency to prefer federal over state law can probably be explained by three factors: (1) the substantial body of federal legislation pertaining to the negotiation of government contracts; (2) the fact that these contracts are frequently incident to interstate transactions; (3) the high likelihood that the litigation would be in the federal courts, regardless of the law applied.[11]

The statement that federal law applies in federal government contract cases must, however, be qualified. Uncertainty has arisen as a result of cases that have failed to indicate whether they have used federal or state law to reach a result that is possible under both.[12] Further doubt is raised by cases in which the court chose state law but did not decide whether it was applying state law in its own right or adopting it as the federal rule.[13] In addition, there are certain types of cases, involving some federal interest, in which the federal courts continue to apply state law: when Congress is found to have intended that state law should apply;[14] when federal statutes incorporate concepts that have always been determined by local law;[15] and when the transactions in question are essentially local in nature and there is no overriding federal interest dictating the use of federal law.[16] Moreover, it has been suggested that state law might apply when the Government places itself in such a position that its rights must be ascertained by reference to local law; as when the government purchases real estate from one whose title may be invalid under local law.[17] Finally, when there is no need for uniformity, state law

---

Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961); Dumbauld, *The Clear Field of Clearfield,* 61 DICK. L. REV. 299 (1957); Friendly, *supra* note 6, at 409; Mishkin 801; Pfocher, *supra* note 2, at 44; Reifenberg, *supra* note 7, at 165-66; 53 COLUM. L. REV. 991 (1953).

10. *E.g.,* Priebe & Sons v. United States, 332 U.S. 407 (1947); National Metropolitan Bank v. United States, 323 U.S. 454 (1945); Dyke v. Dyke, 227 F.2d 461 (6th Cir. 1955), *cert. denied,* 352 U.S. 850 (1956); Fansteel Metallurgical Corp. v. United States, 172 F. Supp. 268 (Ct. Cl. 1959). See WRIGHT, FEDERAL COURTS § 60 (1963); Pfocher, *supra* note 2, at 37, 54-55. However, one commentator has noted the dangers inherent in a blanket application of federal law to all government contracts and the necessity for variations in special contexts. See Mishkin 820.

11. *Ibid.*

12. *E.g.,* S.R.A. Inc. v. Minnesota, 327 U.S. 558 (1946).

13. United States v. Yazell, 382 U.S. 341 (1966); 65 MICH. L. REV. 359 (1966).

14. Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946); United States v. Certain Property, 306 F.2d 439 (2d Cir. 1962) (what constitutes real property for purposes of federal condemnation).

15. *E.g.,* DeSylva v. Ballentine, 351 U.S. 570 (1956) (meaning of "children"); Poff v. Pennsylvania R.R., 327 U.S. 399 (1946) (meaning of "next of kin" under the FELA).

16. Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956).

17. United States v. Standard Oil Co., 332 U.S. 301, 308-09 (1947) (dictum) ("as when it purchases real estate from one whose title is invalid by that law in relation to another's claim"). *But see* United States v. State Box Co., 219 F. Supp. 684 (N.D. Cal. 1963).

will control an action on a government contract which has been adapted to the specific law of the state concerned.[18]

Even where the courts purport to apply a federal rule, the sources from which this federal rule is determined have remained varied.[19] One possible source, which was suggested in *Clearfield*, is the commercial law that was developed by the federal court decisions in the century prior to *Erie*.[20] The courts also have often turned to state law[21] and to the general principles of contract law, as sources for determining federal law.[22] The principal case is in accord with a separate line of decisions that have found federal law in certain uniform laws that have been generally accepted by the states, such as the Uniform Sales Act,[23] the Negotiable Instruments Law,[24] and the Warehouse Receipts Act.[25]

It has been argued that a federal law of contracts should be enacted in order to end the disparities, confusions, and conflicts that arise under present law, and thus prevent the rights of the United

18. United States v. Yazell, 382 U.S. 341 (1966); *cf.* United States v. Kramel, 234 F.2d 577 (8th Cir. 1956). *Contra*, United States v. Matthews, 139 F. Supp. 683 (N.D. Cal. 1956), *rev'd on other grounds*, 244 F.2d 626 (9th Cir. 1957).

19. See Mishkin 797. In a given case a federal court might formulate a substantive rule of its own or elect to draw from an established body of state law. Basically, this process of election involves a balancing of the need for a uniform federal rule against the desirability of absorbing local law. See WRIGHT, FEDERAL COURTS § 59 (1963); Mishkin 811-13 & 814-32. Where there have been compelling reasons to ignore state law and to follow an independent federal rule, courts have done so either because of a clear congressional policy, *e.g.*, Deitrick v. Greaney, 309 U.S. 190 (1940), or lack of a significant advantage to be served by adopting state law, *e.g.*, Dyke v. Dyke, 227 F.2d 461 (6th Cir. 1955), *cert. denied*, 352 U.S. 850 (1956).

20. Mr. Justice Douglas noted that although the federal law merchant, which developed as part of the federal common law in the century following Swift v. Tyson, 41 U.S. (16 Peters) 1 (1842), represented general commercial law rather than a strictly federal rule designed to protect federal rights, it stood as a convenient source from which to fashion federal rules for federal question cases. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

21. *E.g.*, Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956); De Sylva v. Ballentine, 351 U.S 570 (1956); see WRIGHT, FEDERAL COURTS § 60 (1963); Mishkin 820-28.

22. *E.g.*, Priebe & Sons v. United States, 332 U.S. 407 (1947); United States v. Allegheny County, 322 U.S. 174 (1944); Southwest Eng'r Co. v. United States, 341 F.2d 998 (8th Cir.), *cert. denied*, 382 U.S. 819 (1965); United States v. Le Roy Dyal Co., 186 F.2d 460 (3d Cir. 1950), *cert. denied*, 341 U.S. 926 (1951).

23. *E.g.*, United States v. Hamden Co-op. Creamery, 297 F.2d 130 (2d Cir. 1961); Whitin Mach. Works v. United States, 175 F.2d 504 (1st Cir. 1949); United States v. United States Foreign Corp., 151 F. Supp. 658 (S.D.N.Y. 1957); Reeve Soundcraft Corp., 2 CCH GOV'T CONT. REP. ¶¶ 17,600.572 & 17,605.30 (1964).

24. New York, N.H. & H.R.R. v. Reconstruction Fin. Corp., 180 F.2d 241 (2d Cir. 1950).

25. Terminal Warehouse v. United States, 101 F. Supp. 937 (D.N.J. 1952). However, in a subsequent Second Circuit case, Judge Friendly rejected a proposed application of the same act because it would not have expressly resolved the issue before the court. Yet state law was adopted, and since both states involved had previously enacted the Uniform Warehouse Receipts Act, the act was still given effect. See Cargill Inc. v. Commodity Credit Corp., 275 F.2d 745 (2d Cir. 1960).

States from being subject to inconsistent[26] or possibly unsympathetic treatment in different jurisdictions.[27] This goal of uniformity is presently unattainable in view of the many alternative sources from which a federal court may choose a rule of decision.[28] Indeed, it has even been suggested that the federal courts have regressed to the very state of uncertainty that *Erie* was intended to eliminate, by engaging in the process of deciding whether to formulate their own rules or to refer to state law.[29] In the principal case, the selection of the Code as the federal law of sales demonstrates an awareness of this problem and provides an avenue for its resolution. The adoption of a uniform act as the federal law seems to promote certainty and uniformity in actions involving government contracts.[30] The fundamental rationale underlying Judge Friendly's majority opinion was that if the court failed to adopt the Code, the progress that the states have made in the direction of a uniform commercial law would have been undermined.[31] Thus, the principal case demonstrates the feasibility of implementing a truly uniform law of government contracts through adoption of the Code by the federal judiciary. All federal government contracts would be governed by the same set of rules, and these rules would be compatible with those already in effect in most states. Moreover, private contractors would not have to accustom themselves to a different set of standards when dealing with the federal government.[32]

The infrequent recourse to uniform laws in the past, however, raises serious doubts as to whether the federal courts will regularly apply the Code,[33] and seems to indicate that the only viable answer is a Congressional act making the Code applicable to all federal

26. See United States v. Allegheny County, 322 U.S. 174 (1944); Byron Jackson Co. v. United States, 35 F. Supp. 665 (S.D. Cal. 1940).

27. See ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS Appendix A (April 1966 Draft); Mishkin 820.

28. See United States v. Kramel, 234 F.2d 577 (8th Cir. 1956); United States v. Matthews, 139 F. Supp. 683 (N.D. Cal. 1956), *rev'd on other grounds*, 244 F.2d 626 (9th Cir. 1957). The courts split as to whether federal or state law controlled in an action against a commission merchant for selling livestock subject to a chattel mortgage which secured a loan from the Farmers Home Administration. A potential source of conflict was created even though these courts found the merchant not liable, since the more widespread state rule would result in liability. Thus, if the *Kramel* court, which chose to apply state law, had been in another state and applying state law, the result would have been different. See 105 U. PA. L. REV. 266 (1956).

29. See Friendly, *supra* note 6, at 411.

30. See New York, N.H. & H.R.R. v. Reconstruction Fin. Corp., 180 F.2d 241, 244 (2d Cir. 1950). After noting that the NIL had been enacted in every state and the District of Columbia, Judge Hand asserted that it was a source of federal law "more complete and more certain, than any other . . . ." This passage is cited by Judge Friendly in the principal case at 676.

31. Principal case at 676.

32. See Mishkin 828, 830.

33. See Mishkin 827; *cf.* Mount Vernon Co-op. Bank v. Gleason, 367 F.2d 289 (1st Cir. 1966).

transactions. The chief merit of this proposal is, of course, the greater uniformity in commercial law that would result. Furthermore, by adopting the Code as the law applicable to federal transactions, Congress would set an example which might encourage other nations to enact a similar code and thereby assist in the removal of international conflicts in commercial law.[34] By limiting its adoption of the Code to cases involving federal government transactions, Congress also would escape the difficulties that might attach if it adopted the Code as applicable to all transactions in interstate commerce.[35] There would be no unconstitutional invasion of an area of law normally reserved to the states.[36] Moreover, since most of this type of litigation is already in the federal courts, either through federal question jurisdiction or because the United States is a party, there would be no overburdening of federal court dockets.[37] A more troublesome obstacle, however, results from the fact that the Code is inconsistent with some existing federal regulations[38] and statutes.[39] Enactment of the Code would repeal prior conflicting legislation,[40] but if Congress desired to retain such regulations and statutes, it could certainly harmonize them with the Code before its adoption.

Nevertheless, in the absence of Congressional adoption of the UCC for transactions involving the federal government, the principal case indicates that the federal courts have a way to perform the task of achieving uniformity.

---

34. See Dean, *Conflict of Laws Under the Uniform Commercial Code: The Case for Federal Enactment*, 6 VAND. L. REV. 479 (1953). The author reports that Japan is considering adoption of the UCC.

35. For arguments favoring a federal enactment of the UCC making it applicable to all interstate transactions, see Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 100 (1951) [hereinafter cited as Braucher, *Federal Enactment*]; Braucher, *The Progress of the Uniform Commercial Code*, 11 AM. J. COMP. L. 293, 300-01 (1962) [hereinafter cited as Braucher, *The Progress*]; Dean, *supra* note 34, at 479.

Although unclear for interstate transactions, Congress could clearly enact the UCC as federal commercial law. See Braucher, *Federal Enactment* 102; Braucher, *The Progress* 301 (1962); Dean, *supra* note 34, at 482; Friendly, *supra* note 6, at 419-20; Comment, 45 MICH. L. REV. 1021 (1947). The comment makes the interesting suggestion that the Code be adopted pursuant to the treaty making power of the federal government.

36. See Braucher, *Federal Enactment* 102; Friendly, *supra* note 6, at 428.

37. See Braucher, *Federal Enactment* 111-12; Friendly, supra note 6, at 428. Braucher does not believe that adoption of the Code for interstate transactions would result in a significant burden on the federal courts, but for persuasive discussions to the contrary, see FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 3, 60 & 102-07 (1928); Mishkin 813.

38. Mount Vernon Co-op. Bank v. Gleason, 367 F.2d 289 (1st Cir. 1966).

39. Representative of such statutes are the National Bank Act and the Bankruptcy Act. Although some effort has been made to reconcile federal legislation with the policies embodied in the Code (as in some amendments to the Warehouse Act), such reconciliation has been on a very limited scale. See Braucher, *The Progress* 293, 301 (1962).

40. U.C.C. § 10-103 repeals statutes, or parts thereof, inconsistent with the Code.