COMPLETION, ACCEPTANCE AND WAIVER OF CLAIMS: BACK TO BASICS*

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INTRODUCTION

Many, including myself, have fallen into the trap of equating Completion of a construction project with its Acceptance.[1] Frequently one party to a construction contract, usually the contractor, contends the project has been "accepted" and the other, usually the owner, contends it has not. This issue obscures the real reason for the dispute, the contractor's contention that the owner cannot assert claims for defective work. Owner and contractor may have agreed that the contractor has *completed* the project in the sense of the contractor having performed in accordance with its contractual *time* commitments. They may have agreed that the contractor has *completed* the project in the sense of the contractor being entitled to the final payment. They may have agreed that the contractor has *completed* the project in the sense of permitting the owner to take possession of the project. But their agreement *ends* when the issue is the *effect* of completion upon the owner's right to assert damages for defective work. Does completion = acceptance = Acceptance? I use Acceptance with a capital A as a legal conclusion, a shorthand for barring claims for defective work.

I shall compare Acceptance with Completion. Next I shall examine the acts asserted to constitute Acceptance and how courts have dealt with these assertions. I shall then address the effect of contract clauses by which the parties, principally the owner, seeks to control this issue. Finally, I shall compare Acceptance under the Uniform Commercial Code and the "common law."

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1. J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 432 (2d ed. 1977) (to be referred to as SWEET).

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I. COMPLETION AND ACCEPTANCE

Construction contracts deal extensively with completion.[2] Acceptance, on the other hand, receives little attention, except language intended to preclude certain acts as accepting the work and *thereby* waiving claims for defects.[3]

Yet many cases involve Acceptance while few deal with Completion. Perhaps this results from the thorough treatment Completion receives in construction contracts. But I suggest we look deeper and that we begin by comparing Completion and Acceptance.

Completion, though important for many purposes we can call "legal," describes a *simple fact.* A project is either completed, substantially or totally, or it is not. This is determined *not* by someone with *legal* skill, but by a person with *technical skill,* by a person who can compare Construction Documents and what is implied by them with the project the contractor claims is completed.

Acceptance, on the other hand, is a complex *legal* term with multiple meanings and a cluster of obscure and conflicting policies. Only lawyers can unravel the intricate strands. Only lawyers can determine whether acceptance = Acceptance. This accounts for its frequent appearance in cases.

Before examining Acceptance in the Construction context, I will address Acceptance in two other legal contexts, the formation of contracts (Offer and Acceptance) and the sale of goods (Tender and Acceptance of nonconforming goods). Then I will unmask the hidden meaning of Acceptance.

"Offer and acceptance" is the mechanism by which agreement is often reached. The offeror dangles his terms before the offeree. "Here are my terms. Are they satisfactory to you? If the offeree is "satisfied," she accepts. She has no obligation to accept the offer, but she must not mislead the offeror by signaling her satisfaction when she is not.

Now, let us move to a sale of goods. What effect does the buyer's "acceptance" of a tender of nonconforming goods have upon any claim she may have for defects? At common law acceptance barred claims for damages. The Uniform Sales Act, the predecessor of the Uniform Commercial Code (UCC), sought to avoid this by allowing the buyer to accept the goods without waiving her claim if she gave the seller prompt notice. Under the Sales Act some "strict constructionist" states held that an

2. AIA Doc. A 201 General Conditions of the Contract for Construction, to be referred to as AIA A201, §§ 8.13, 9.8, 9.9 (1976): NSPE/ACEC/CSI/Standard General Conditions of the Construction Contract, to be referred to as NSPE 1910-8, Art. 1, §§ 14.8-14.14 (1978). *See also* Brooks Towers Corp. v. Hunkin-Conkey Constr. Co., 454 F.2d 1203, 1205 (10th Cir. 1972) which defined it as "when the work is ready for occupancy for its intended purposes, except for customization of tenants and "punch list" items to be completed by Contractor." At one time completion terminated tort exposure of participants to third parties. Now completion does not have this effect. *See* SWEET, § 32.05(c).

3. AIA Doc. A 201, § 9.5.5. (1976); NSPE 1910-8, § 14.15 (1978). Each form does allow the owner to accept defective work and take a price reduction. A 201 at 13.3.1, 1910-8 at 13.13.

acceptance of nonconforming goods barred damage claims unless the buyer made clear to the seller she intended to look to the seller *for damages,* some even requiring a detailed basis for the claim of breach. Other states were less demanding, merely requiring the buyer complain of *breach.* The UCC adopted the latter, more liberalized notice requirement, thereby reducing the likelihood acceptance will bar the claim.[4] We want to encourage acceptance because it carries out the exchange. Acceptance also avoids the forfeiture that can result if the seller has to retake possession of the goods and the often difficult task of establishing damages for nondelivery of the goods.

But the buyer must give *some* notice to protect her claim.[5] Failure to give the requisite notice is often described as a *waiver* of the claim. I shall discuss waiver in the context of the construction contract.

Momentarily putting aside any claim preservation function of a notice requirement, let us move back to the offer and acceptance analogy. Tender of nonconforming goods can be looked upon as an "offer" by the seller of the goods as "full satisfaction," just as a check for a lesser amount can be tendered as full satisfaction. Unqualifiedly accepting nonconforming goods at common law constituted "acceptance" barring the buyer from asserting a claim for defective goods. This was *conclusive* evidence that she was satisfied, would pay for the goods and not assert a claim for defects.

Now let us move to construction contracts. Let us start with a simple illustration. At the end of the job the contractor presents the "completed" house (with some defects) for the owner's "acceptance." It is like the tender of nonconforming goods. The contractor asks if the owner will consider the project "completed," as "full satisfaction" *despite* deviation from contract requirements. Suppose the owner "accepts" the house as "tendered." She *may* be communicating an intention to give up any claim she may have for defective work, particularly obvious defects but though less likely, defects which turn up later. *If so,* compliance with the contract requirements now or even later are no longer relevant.[6]

In most construction work the process is not that simple.

First, building contracts of any complexity express the contractual obligations through detailed drawings and specifications and often debatable implied terms. Instead of visual inspection by a home owner we

4. *See* authorities collected in Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 976 (5th Cir. 1976).

5. A notice has many useful attributes. It:

1. Gives the seller the opportunity to cure curable nonconformity;
2. Permits the seller to eliminate the cause of the nonconformity and avoids further defective shipments;
3. Can set into motion investigation of the claim and help reduce false claims;
4. Encourages settlement of disputes;
5. Triggers a claim the seller may have against third parties who cause the defect;
6. Avoids seller reliance on silence as indication no claim would be made.

Eastern Air Lines, Inc. v. McDonnell Douglas Corp. *supra* note 4 at 970-980. *See also* Sweet, *Extensions of Time and Conditions of Notice,* 51 CALIF. L. REV. 720, 725–26 (1963).

6. *See* 5A A. CORBIN, CONTRACTS, § 1245 (1964).

are likely to have a careful, final inspection by the design professional, such as an architect, engineer or a construction manager. Also, rarely does the contractor perform "to the letter." When much of the work is subcontracted, the contractor may not even be aware of defects at the final inspection.

Second, unlike the goods buyer, the owner cannot simply tell the contractor to "take the work back." It is attached to the owner's land. Removal would be too wasteful. It will remain there.[7]

Third, the complexity of the construction exchange means the greater likelihood of defects being discovered *after* the owner has taken possession than in goods transactions. This can increase the likelihood of conduct which signals satisfaction with the work despite *obvious* defects but not an intention to give up claims for defects which turn up later.[8]

What is the theoretical basis for barring the owner from asserting a claim for defective work because of Acceptance? It is the hopelessly complex concept of waiver. In contract law the strongest case for waiver is estoppel based upon reliance.[9] If the owner leads the contractor to believe she is satisfied, will pay the outstanding balance and will assert no future claims, contractor *reliance* upon this representation creates waiver.

Suppose the contractor told the owner he would like to install wood panel "A," which he has on his truck, rather than go back to his supplier to get panel "B," the panel specified by the contract. If the owner says "A" is acceptable, we do not let the owner change her mind (retract the waiver) because the contractor has relied upon her representation that she would pay despite the deviation. Similarly, the owner's direction to the contractor to perform extra work despite the absence of a written change order required by the contract would be estoppel-based waiver. But reliance in Acceptance cases is rare. As a rule we have no representation or promise relied upon by the contractor. What if we cannot find estoppel-based waiver?

Waiver can relieve against the harshness of the conditions doctrine and its forfeiture propensities. Suppose the amount retained by the owner *far* exceeds the damages caused by defective work, or the owner's refusal to pay is based upon a "technical" noncompliance, such as failure to obtain a written change order? A court may *search* for con-

7. These two factors and the forfeiture possibility discussed in the text above led to the substantial performance doctrine.

8. Many cases conclude acceptance bars obvious defects only. *See* A. H. Sollinger Constr. Co. v. Illinois Bldg. Auth., 5 Ill. App. 3d 554, 283 N.E.2d 508 (1972); Maloney v. Oak Builders, Inc., 224 So. 2d 161 (La. App. 1969); Salem Realty Co. v. Batson, 256 N.C. 298, 123 S.E.2d 744 (1962); Stevens Constr. Corp. v. Carolina Corp., 63 Wis. 2d 342, 217 N.W.2d 291 (1974).

9. 3A. A CORBIN, CONTRACTS, § 753 (1960). Among the few cases seeking to differentiate waiver from estoppel, the latter's reliance being a substitute for consideration, are Montgomery Ward and Co. v. Robert Cagle Building Co., 265 F. Supp. 469 (Tex. 1967); Texana Oil Co. v. Stephenson, 521 S.W.2d 104 (Tex. Civ. App. 1975) (no consideration needed for waiver): Steinbrecher v. Jones, 151 W.Va. 462, 153 S.E.2d 295 (1967) (no consideration needed for waiver).

But if the performance assertedly waived was a material part of the exchange, consideration or reliance is needed. 3A A. CORBIN, CONTRACTS, § 753 (1960). This has rarely, if ever, been an issue in building cases.

duct by the owner which supports a contractor assertion of "waiver" to justify awarding the final payment or additional compensation despite non-occurrence of express conditions such as full performance or a writing requirement.

But most disputes over Acceptance involve claims for damages for defective work discovered *after* final payment. Here the issue is whether the owner's conduct manifests an intention to give up her claim for *damages*. Perhaps, as we shall see, judicial reluctance to find waiver by acceptance implicitly recognizes the difference between forfeiture avoidance and barring damage claims for defective work.

As in tender and acceptance of nonconforming goods we want to encourage the owner to "accept," to take possession of the project and make final payment as soon as possible. This avoids disputes over the amount due the contractor for his work and a usable project lying idle. Finally, taking over the project gives *finality* to the most important part of the exchange.

But the owner may not take possession if this means Acceptance which waives obvious defects and, more important, defects which she cannot be expected to discover until after she takes possession. If she does accept yet wishes to preserve her claims for defects we would *prefer* that she make clear that taking possession is not Acceptance waiving claims for defects. (Whether she *must* do so will be discussed later.) Making her position clear should, as in the "tender-acceptance" we saw in the goods transactions, bring disputes out in the open, get them discussed, negotiated, and settled. Bringing complaints into the open may encourage cure, avoid spurious afterthought claims, reduce the likelihood of contractor reliance based upon his belief the job was finished, and allow the contractor to assert claims against responsible third parties.

Despite our desire to encourage acceptance and bring disputes in the open, we do not wish to destroy the power of the parties to make contractual adjustments by agreeing to take something less than full performance as satisfaction. Nor do we wish to deprive the owner of the power to give up any claim she may have. But because we are dealing with the waiver of a claim that the owner has not received the *performance for which she has paid,* we would like *clear* evidence that this is what she intended, an intention communicated to the contractor.

II. ACTS ASSERTED TO CONSTITUTE ACCEPTANCE

The contractor may point to any or a combination of the following, all significant acts in the construction process:

1. Certificates issued by the *design professional* authorizing progress payments, finding substantial completion or authorizing final payment;
2. Completion of all corrections listed on a "punch list," sometimes

prepared by the *owner* but more commonly by the *design professional;*

3. The *owner's* making a payment, particularly the final payment;[10]
4. The *owner's* occupation, use or formal "acceptance" of the project.

A. *Certificate Issuance*

Waiver based upon certificate issuance is premised upon the conclusiveness often given to the certificate by the construction contract.[11] Yet often construction contracts make clear that issuance does not waive defective work.[12] Clearly any such apparent conflict should be resolved in favor of the specific provisions negating waiver.[13] The American Institute of Architects (AIA) in its documents appears to make the nonwaiver clause predominate.[14]

Progress payments relieve the contractor from the burden of financing the job by paying him as he performs. Under the national standard forms the inspection made by the design professional which precedes issuance of a progress payment certificate though not casual is not intended to carefully check for defective work.[15] *If* the design professional discovers defective work, he should order the work be corrected or reduce the amount certified for payment. But the main purpose of the inspection is to determine *how far* the work has progressed and not whether all work complies with contract requirements.

Also, the interrelationship between the design professional's power to

10. I will not discuss acceptance by the contractor of the final payment as waiving any claim *he* may have against the owner. The AIA creates a waiver unless the contractor had made a claim *in writing* and identified it as "unsettled" at the time of the final Application for Payment. AIA Doc. A 201, § 9.9.5. *See also* NSPE 1910-8, § 14.16.2. *See* Dahlstrom Corp. v. State Hwy, Com'n., etc., 590 F.2d 614 (5th Cir. 1979) (contractor could not challenge validity of liquidated damages clause when he accepted payment): Ramos v. City of Santa Clara, 35 Cal. App. 3d 93, 110 Cal. Rptr. 485 (1973) (contract provided acceptance waived claims).

Also, the special rules governing accord and satisfaction come into play here as the payment is sometimes made by a check tendered in full and final settlement of all claims.

The issue which has proved troublesome is whether UCC § 1-207 changes the common law check cashing accord and satisfaction rules. For a case holding the UCC did change the rules in a construction context *see* Miller v. Jung, 361 So.2d 788 (Fla. App. 1978). *See generally* WHITE AND SUMMERS, UNIFORM COMMERCIAL CODE, § 13-21 (2d ed. 1980); Hawkland, *The Effect of UCC § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 COMM. L.J. 329 (1969).

11. SWEET, § 27.09.

12. *See* note 3, *supra*. Also, standard forms permit the design professional to nullify in whole or in part a previously issued certificate upon discovery of defective work. AIA Doc. A201, § 9.6.1, NSPE 1910-8, § 14.7.

13. Flour Mills of Am., Inc. v. American Steel Bldg. Co., 449 P.2d 861 (Okla. 1969). In Bickerstaff v. Frazier, 232 So. 2d 190 (Fla. App. 1970), the Court held the trial court's order for a rehearing relating to the conclusiveness of the certificate was not erroneous as a matter of law and the owner permitted to counterclaim for defective work. No facts were given.

14. One court reconciled the clauses by making the certificate conclusive as to *patent* but not *latent* defects. City of Midland v. Waller, 430 S.W.2d 473 (Tex. 1968). It is more accurate to make the certificate conclusive as to *disputed* performance, that is, disputes brought *into the open*. *See* note 8, *supra*.

15. AIA Doc. A 201, § 9.4.2 (1976); AIA Doc. B 141, Standard Form of Agreement Between Owner and Architect §§ 1.5.4, 1.5.8 (1977); NSPE 1910-8, § 14.5; NSPE 1910-1 Standard Form of Agreement Between Owner and Engineer, §§ 1.6.2, 1.6.5 (1979).

resolve disputes[16] and his lack of *general* authority to modify the contract or accept defective work can generate confusion.[17]

Suppose the design professional resolves a dispute over compliance. His decision, sometimes expressed through the progress payment certificate, is given considerable finality by contract and by law.[18] The party displeased with his decision may *believe* the design professional has *changed* the contract. But the design professional's judging role does not allow him to *knowingly* accept work which does not comply with the contract requirements. Of course this does *not* preclude the possibility of an incorrect decision which *in reality* changed the contract and accepted defective work. But this results not from certificate issuance accepting defective work but from the finality accorded even a wrong decision.[19]

Suppose there is no specific issue of work conformity, the design professional simply issuing a progress payment certificate. As stated the inspection which precedes issuance of a progress payment certificate is not thorough.[20] The contractor should realize that issuance of such a certificate does not indicate satisfaction with *all* of the work. He should not expect issuance to preclude the owner from a claim for *subsequently* discovered defects even if the defect *existed* at the time of the inspection.

Inspection which precedes issuance of a substantial completion or final completion certificate is more comprehensive.[21] Yet much of what I have said about the effect of a progress payment certificate applies to "end of the job" certificates. First, although the standard forms vary slightly,[22] under them issuance of "end of the job" certificates do *not* waive defective work any more than progress payment certificates. Second, the design professional does not issue any certificate which *knowingly* includes nonconforming work.[23] Third, *disputed* items resolved in "end of the job" certificates should be dealt with the same way as dispute resolution which culminates in a progress payment certificate.

But the need to finalize transactions and the more thorough inspection given at the end of the job does create a greater risk of acceptance

16. AIA Doc. § 2.2.9; NSPE 1910-8 § 9.9.

17. SWEET, §§ 20.05(b), 26.02(a). The contractor can offer to substitute equivalent material or equipment for brands specified. Usually approval of the substitution is made by the design professional. *See* NSPE 1910-8. § 6.7. *See also* AIA Doc. A 201. § 4.5.1. This is *specific* authority to authorize a change. But in the absence of specific authority, the design professional lacks power to modify the contract. *See also* AIA Doc. A 201, § 2.2.10 and NSPE 1910-8 §§ 9.3, 9.9.

18. AIA Doc. A 201, §§ 2.2.11, 2.2.12; NSPE 1910-8, § 9.10. See note 11, *supra*. City of Midland v. Waller, *supra* note 14 made his decisions conclusive as to patent but not latent defects. This does *not* give the architect authority to *knowingly* accept defective work. In national standard forms most decisions can be appealed through arbitration.

19. As indicated, the design professional can nullify a previously issued certificate because of *subsequently discovered* defective work. See note 12 *supra*. *See also* City of Midland v. Waller, *supra* note 14 (conclusive only as to patent defects).

20. Note 15, *supra*.

21. AIA Doc. A 201, § 9.4.2. But § 9.9.1 appears to use a subjective standard similar to inspections made prior to issuance of a Progress Payment Certificate. But "end of the job" inspections are more thorough. See also NSPE §§ 14.11, 14.12.

22. NSPE 1910-8 §§ 14.15, 14.16 (1968) seems to cover *all* certificates. But AIA bars waiver only for issuance of *progress* payment certificates. See AIA Doc. A 201, § 9.9.4. Both preclude waiver by final payment.

23. See note 17 *supra*.

when "end of the job" certificates are issued.[24] Also, some contracts give a greater finality to these certificates than progress payment certificates.[25] The contractor may reasonably believe that the design professional has authority to determine compliance, perhaps *too* easily converted into authority to accept defective work and bar later claims. Clearly the presence of contract language negating waiver or creating a post-completion warranty should bar any contractor claim that defects have been waived. Even without such clauses "end of the job" certificates should only affect any owner claim for defective work when issuance is the resolution of a dispute in favor of compliance made by the design professional.

B. *Punch List as Conclusive*

Along with a certificate of Substantial Completion the design professional usually prepares a "punch list," an itemization of work that must be corrected before the final payment is earned. Suppose the contractor claims any defect not stated on the punch list has been waived. The standard forms deny conclusiveness to the punch list.[26] The better reasoned cases permit the owner to assert a claim for work not on the punch list.[27] While it may be a disappointment to the contractor to have to repair a defect he *might* have thought had passed final inspection, creating a punch list does not indicate that the owner is satisfied with everything else and will make no further claim for defective work. All defects cannot easily be gathered together and put into a *final* list. Defects turn up after punch lists are created. Often the punch list is prepared by the design professional who has no power to waive defects. But the owner's awareness of a particular defect and failure to include it on the punch list may signal to the contractor that the owner was giving up any claim for *this* defect, but *not* defects which turn up later.

Suppose the contractor actually relied upon the punch list as final? Suppose he withdrew his men and equipment after repairing all items on the punch list and then was asked to send them back to repair yet another defect?

Did the contract, the certificate or the punch list *clearly* indicate that

24. A finding of acceptance is sometimes based *both* on a final certificate *and* final payment. In Grass Range High School Dist. v. Wallace Diteman, Inc., 155 Mont. 10, 465 P.2d 814 (1970) defective work on a punch list was corrected and a final certificate issued without conditions. The Court held the warranty clause did *not* cover such a defect, a doubtful conclusion. Issuance of the final certificate should not obliterate the warranty clause here. For a case upholding a clause precluding waiver by Final Certificate or Final Payment *see* School Dist. No. 65R v. Universal Surety Co. Lincoln, 178 Neb. 746, 135 N.W.2d 232 (1965) (upheld against surety).

25. In Hunt v. Owen Bldg. & Inv. Co., 219 S.W. 138 (K.C. App. Mo. 1920) the court upheld a clause stating that no certificate or payment is conclusive *except* the final certificate and final payment.

26. AIA Doc. A 201, § 9.8.1; NSPE 1910-8, § 14.8. Similarly both associations seek to accomplish this in their standard payment certificates. *See* AIA G 704 (1978); NSPE 1910-8D (1978).

27. New England Structures, Inc. v. Loranger, 354 Mass. 62, 234 N.E.2d 888 (1968). *But see* Maloney v. Oak Builders, Inc., 224 So.2d 161 (La. App. 1969) (punch list conclusive).

the punch list was tentative and *not* conclusive? If so, the contractor's claim is denied. If the language made clear that the punch list was final and conclusive, the contractor's claim is justified. But suppose the language does not point in either direction. We are left with implied waiver, waiver by act, always a difficult concept to apply. Unless the contractor knew of the owner's intention that the punch list was *not* conclusive, the contractor should be able to recover any loss he can establish he incurred by having relied on the punch list. This remedy adjustment, shifting proven reliance losses rather than barring the claim for defective work, is a good compromise even if we are not sure the reliance was reasonableness.

C. *Payment by the Owner, Progress or Final*

Payment by the owner avoids the issue of the design professional's authority and his differing roles. But payment in and of itself does not indicate the owner intended to give up claims for defective work, nor, using estoppel language, constitute a representation by the owner that can be reasonably relied upon by the contractor that no claim will be asserted, particularly when contract clauses negate waiver.[28]

But there are two exceptions. First, suppose the owner is aware of a minor defect and pays without protest or reservation? This, with other communicated evidence of the owner's intention, can manifest the owner's willingness to waive *that* claim.[29] These circumstances signal to the contractor that the owner is satisfied and is giving up any claim she may have based upon *that* defect.

Second, if the final payment is part of a settlement which encompasses *all* defects, whether *latent* or *patent,* final payment as part of a settlement should bar any future claim for defective work. While this may be an unwise decision, the owner can take this risk.[30]

A settlement followed by payment is an accord and satisfaction discharging all claims. It takes precedence over any clauses which state that final payment does not waive claims for defective work and that the contractor warrants the quality of his material and workmanship for a designated period after completion. But it is probably best to note in the settlement any contract clauses which may appear contradictory and state they have been superseded.

Giving up a claim for defective work, even if minor, is a serious mat-

28. Metropolitan San. Dist. v. A. Pontarelli & Sons, Inc., 7 Ill. App. 3d 829, 288 N.E.2d 905 (1972); Houlette & Miller v. Arntz, 148 Iowa 407, 126 N.W. 796 (1910); Parsons v. Beaulieu, 429 A.2d 214 (Maine 1981); Handy v. Bliss, 204 Mass. 513, 90 N.E. 864 (1910); Burke Cty. Pub. Sch. etc. v. Juno Constr., 273 S.E.2d 504 (N.C. App. 1981) *See* Annot. 66 A.L.R.2d 570 (1959) for a discussion of progress payments as waiver of defects. Payments without reservations *may* waive *known* defects. *Id.* at 573. *See also* CORBIN *op cit. supra* note 6.

29. Handy v. Bliss, *supra* note 28. This result was reached based upon a contract clause under which payment waived obvious defects in Monson v. Fischer, 118 Cal. App. 503, 5 P.2d 628 (1931). *See* Annot. 66 A.L.R.2d 570, 573 (1959).

30. Saldal v. Jacobsen, 154 Iowa 630, 135 N.W. 18 (1912); Houlette & Miller v. Arntz, *supra* note 28.

ter. The terms of the settlement must clearly establish subsequently discovered defects are being traded away.[31]

As in the case of a "end of the job" certificate, a final payment runs a greater risk of creating a waiver. Also, clauses, particularly in older contracts, can create waiver by final payment.[32]

D. *Possession, Use or Formal "Acceptance"*

These are the most difficult cases. The owner's taking possession, using the project or executing a formal "acceptance," or any *combination* of these acts are significant acts which *can* signal satisfaction. Arguably owners, particularly business owners, should realize that if they perform any of these acts *without reserving their rights* they may be communicating that they will not make any claims, at least for obvious if not subsequently discovered defects.[33] Also, there is likely to have been a comprehensive inspection by the design professional or owner prior to taking possession.[34]

On the other hand pressures often force the owner, even a sophisticated one, to take possession despite her unwillingness to waive claims. And owners, particularly unsophisticated ones, may not realize they risk losing their claims if they do not make their position clear.

Taking possession or using the project or even a formal "acceptance" does not *automatically* waive defects even if the owner does not make clear she is preserving her rights, a conclusion strengthened if the defects are latent and contract clauses preclude waiver.[35] The owner may have taken possession or used the project because she was subjected to unconscionable contractor pressure,[36] had to take possession to obtain a loan,[37] or government grant,[38] had given up possession of her old house

31. In Landon v. Lavietes, 156 Ga. App. 123, 274 S.E.2d 120 (1980) the court concluded making and acceptance of the final payment did *not* constitute an accord and satisfaction and the owner could rely upon the warranty clause.

32. Jenkins v. American Sur. Co. of N.Y., 45 Wash. 573, 88 P. 1112 (1907).

33. Moorhead Constr. Co., Inc. v. City of Grand Forks, 508 F.2d 1008 (8th Cir. 1975). But it is unfortunate that courts sometimes hold unsophisticated owners to this high standard. For example in Cantrell v. Woodhill Enterprises, Inc., 273 N.C. 490, 160 S.E.2d 476 (1968) a consumer purchaser of a home moved in and signed a formal Veteran's Administration Acceptance. He complained of defects to the VA inspector but the latter assured him anything that went wrong in the first year of possession would be corrected. Yet the court held he waived defects by moving in and paying.

An inexperienced owner was treated more sympathetically in Michel v. Efferson, 223 La. 135, 65 So. 2d 115 (1953).

34. Moorhead Constr. Co. Inc. v. City of Grand Forks, *supra* note 33.

35. Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102 (4th Cir. 1980) (by implication); Aubrey v. Helton, 276 Ala. 134, 159 So. 2d 837 (1964); Banducci v. Frank T. Hickey Inc., 93 Cal. App. 2d 658, 209 P.2d 398 (1949); Honolulu Roofing Co. v. Felix, 49 Haw. 578, 426 P.2d 298 (1967); Markman v. Hoefer, *infra* note 40; Hemenway Co. Inc. v. Bartex, Inc. of Texas, 373 So. 2d 1356 (La. App. 1979); Bismarck Baptist Church v. Wiedemann Indus. Inc., 201 N.W.2d 434 (N.D. 1972); Hurley v. Kiona-Benton Sch. Dist. No. 27, 124 Wash. 537, 215 P. 21 (1923). But see Cantrell v. Woodhill Enterprises, Inc., *supra* note 33.

36. Michel v. Efferson, *supra* note 33 (refusal to give owner key when she had sold her old house); Steinbrecher v. Jones, *supra* note 9 (contractor evicted owner from home which she had leased from contractor to *force* her to take possession).

37. Hemenway Co. Inc. v. Bartex, Inc. of Texas, *supra* note 15.

38. Brasher v. City of Alexandria, 215 La. 887, 41 So.2d 819 (1949).

or place of business[39] or would suffer financial losses[40] unless she took possession or used the project. If these reasons were *known* to the contractor, clearly these acts would not signal that the owner was satisfied and giving up her claims.

Even if the contractor did not know of the *actual* reasons for taking possession or using the project, these acts should not create waiver. Taking possession or using the project or even formal "acceptance" does not unambiguously indicate the owner does not intend to pursue claims for defective work, particularly if contract language denies that such acts waive defects.[41] Likewise, taking possession in reliance on a contractor's promise to cure or remedy the defect does not manifest a willingness to waive claims for the defects.[42]

We would like owners to take possession as soon as possible. They will more likely do so if they are not fearful they will lose any claim they may have.

E. *UCC Compared: Should a Notice Be Required?*

Let us compare the legal solutions in the construction cases to the UCC. Claims preservation under the UCC does not require any reservation of rights *at the time of acceptance.* But Section 2-607(3) bars the claim if the accepting buyer does not give a notice within a reasonable time after he discovers or should have discovered the defect. Should construction cases follow the UCC and bar claims if a notice is *not* given after the defective work is discovered?

The UCC employs a relatively simple "rule of law." No notice: claim barred. The construction cases look for "waiver," an open-textured factual rule which evaluates the acts claimed to constitute a waiver *and* all other relevant facts which bear upon communication of owner satisfaction. Failure to give a notice can, *along with other evidence,* be the basis for a waiver, particularly if it induced reliance by the contractor.

Despite the undoubted deficiencies of a case-by-case rule, it works better here. Tort doctrines of strict liability jettisoned commercial law notice requirements, mainly because it was thought consumers are not knowledgeable in the niceties of commercial law.[43] The construction defect cases have taken, rightly I think, a similar approach.

Admittedly, the owner, whether experienced or not, will very likely complain loudly when she discovers a defect before or after taking possession. Yet the inexperienced owner may not give the kind of notice which would pass muster even under the loose standard used in the UCC. To deprive the construction owner, who is often a *consumer* of the

39. Honolulu Roofing Co. v. Felix, *supra* note 35. See note 36 *supra.*
40. Markman v. Hoefer, 252 Iowa 118, 106 N.W.2d 59 (1960).
41. Aubrey v. Helton, *supra* note 35. *See* CORBIN, *op cit., supra* note 9.
42. Hennebique Const. Co. v. Boston Cold Storage & T. Co., 230 Mass. 456, 119 N.E. 948 (1918).
43. Greenman v. Yuba Power Prod., Inc., 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963). For a retreat from a notice rule in a consumer construction case see Orto v. Jackson, 413 N.E.2d 273 (Ind. App. 1980).

type increasingly receiving legal protection, of an often significant claim because of a technical deficiency would create the same "trap for the unwary" eliminated by strict liability.

Finally, what effect should the now almost universal use of waiver negating language have on this issue? I suggest that those few transactions where such protection will *not* be found are those where the form may be supplied by the contractor or be purchased from a legal stationery store. Consumers who make *these* contracts need the protection of an open-textured, case-by-case approach, not the merchant-oriented "rule of the law" used by the UCC.

Application of this open–textured "factual" rule has generated relatively few holdings which have barred owners' claims for defects,[44] particularly significant ones discovered after the owner has taken over the project.

F. *The Effect of Contract Clauses*

As noted, clauses in the construction contract or construction administration forms often seek to preclude waiver when certificates are issued, payments made and premises used or occupied. Despite the clearly adhesive nature of many construction contracts, these clauses have been simply "applied" and have been influential in avoiding waiver.[45] Modern forms, particularly those published by national organizations, are more comprehensive, and more likely to preclude waiver than older forms.

Yet drafting often leaves much to be desired. This can invite courts to disregard or distort the language. Contracts must make clear which acts waive which claims. Also, what are called Warranty, Guaranty or Correction of the Work clauses, one function of which is to preclude waiver by Acceptance,[46] are particularly poorly drafted and create interpretation problems.[47]

44. Cantrell v. Woodhill Enterprises, *supra* note 33; Hemenway Co. Inc. v. Bartex, Inc. of Texas, *supra* note 35; *see* patent defect cases cited *supra* note 8 and CORBIN, *op cit. supra* note 9.

45. A.W. Therrien Co., Inc. v. H.K. Ferguson Co., 470 F.2d 912 (1st Cir. 1972); Nordin Const. Co. v. City of Nome, 489 P.2d 455 (Alaska 1971); Hemenway Co. Inc. v. Bartex, Inc. of Texas, *supra* note 35; School Dist. No. 65R v. Universal Surety Co., Lincoln, 178 Neb. 746, 135 N.W.2d 232 (1965) (upheld as to surety); Burke City Public Sch. etc. v. Juno Const. Co., 273 S.E.2d 504 (N.C. App. 1981); Hutchinson v. Bohnsack School Dist., 51 N.D. 165, 199 N.W. 484 (1924); Welsh v. Warren, 159 S.W. 106 (Tex. Civ. App. 1913). See *supra* notes 13 and 14 where courts differed on the interrelationship between clauses seeking to preclude waiver and making a certificate conclusive. See also note 35 *supra*, cases where the language in the contract was cited in holdings which refused to find waiver of defects.

46. Mooney v. Skoumal, 251 Ark. 1021, 476 S.W.2d 237 (1972); Independent School Dist., No. 35 v. A. Hedenberg & Co., 214 Minn. 82, 7 N.W.2d 511 (1943); City of Midland v. Waller, 430 S.W.2d 473 (Tex. 1968); Lebco, Inc. v. MacGregor Park Nat'l Bank of Houston, 500 S.W.2d 698 (Tex. Civ. App. 1973).

47. This deceptively simple clause could justify a separate article. Some *asserted* purposes of such a clause are:

1. Create an *express* warranty of proper workmanship where this is not implied. See Samuelson v. Chutich, 529 P.2d 631 (Colo. 1974).
2. Shift the burden of exculpating causes to the contractor. Orto v. Jackson, 413 N.E.2d 273 (Ind. App. 1980).

G. *Summary*

Waiver must be pleaded[48] and is treated as an issue of fact usually resolved by the jury.[49] As a result *particular* acts, such as an issuance of a certificate, the creation of a punch list, payment or occupation, formal acceptance, in and of themselves do not create waiver. Perhaps the closest we see of a rule of law are those few decisions which justify a conclusion of nonwaiver by a simple reference to a contract clause.[50] But

3. Shift the risk of defective design to the contractor. Bryson v. McCone, 121 Cal. 153, 53 P. 637 (1898) (industrial plant); St. Andrews Episcopal Day Sch. v. Walsh Plumbing Co., 234 So.2d 922 (Miss. 1970) (church school). Burke Cty. Pub. Sch. etc. v. Juno Constr. Co., 273 S.E.2d 504 (N.C. App. 1981) (Agreement to Maintain Roof for Five Years); Shuster v. Sion, 86 R.I. 431, 136 A.2d 611 (1957); Shopping Center Management Co. v. Rupp, 54 Wash. 2d 624, 343 P.2d 877 (1959). *See also* Pinellas County v. Lee Constr. Co. of Sanford, 375 So.2d 293 (Fla. App. 1979) which apparently employed the clause to shift the design risk to the contractor. But in Wood-Hopkins Constr. Co. v. Masonry Contractors, Inc., 235 So.2d 548 (Fla. App. 1970) a warranty clause which appeared to do so was held not to have shifted the risk. The case dealt with unsuitable rather than defective materials, a design risk. For cases holding the clause did *not* shift the risk of unsuitable materials or equipment *see also* Kurland v. United Pac. Ins. Co., 251 Cal. App. 2d 112, 59 Cal. Rptr. 258 (1967); Teufel v. Wienir, 68 Wash. 2d 31, 411 P.2d 151 (1966).
4. Provide a remedy for measuring the contractor's breach, particularly eliminating the diminution in value measurement and giving the owner cost of correction. Leggette v. Pittman, 268 N.C. 292, 150 S.E.2d 420 (1966) *But see* Salem Towne Apts. Inc. v. McDaniel & Sons Roofing Co., 330 F. Supp. 906 (N.C. 1970); Fid. & Dep. Co. of Md. v. Stool, 607 S.W.2d 17 (Tex. Civ. App. 1980). For contrary holdings see U.S. v. Franklin Steel Products, Inc., 482 F.2d 400 (9th Cir. 1973); Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc., 336 A.2d 211 (Del. 1975). *See also* Pinellas County v. Lee Constr. Co. of Sanford, *supra* note 47 which applied cost of correction without discussion. *See* AIA reference *infra* this note.
5. Create a private Statute of Limitations. A few cases hold it creates a private limitation period. Cree Coaches v. Panel Suppliers, Inc., 384 Mich. 646, 186 N.W.2d 335 (1971) (suggesting a different result in an adhesion context); Independent Consol. Sch. Dist. No. 24 v. Carlstrom, 277 Minn. 117, 151 N.W.2d 784 (1967). *See also* Burton-Dixie Corp. v. Timothy McCarthy Constr. Co., 436 F.2d 405 (5th Cir. 1971) (apparent dictum); Grass Range High Sch. Dist. v. Wallace Diteman, Inc., *supra* note 24 (dictum). The AIA and most cases do not agree. AIA Doc. A 201, § 13.2.7; First Nat'l Bank of Akron v. Cann, 503 F. Supp. 419 (Ohio 1980); Norair Eng'g v. St. Joseph's Hosp. Inc., 147 Ga. App. 595, 249 S.E.2d 642 (1978); Board of Regents v. Wilson, 27 Ill. App. 3d 26, 326 N.E.2d 216 (1975); Michel v. Efferson, *supra* note 33; Newton Housing v. Cumberland Constr. Co., 5 Mass. App. 1, 358 N.E.2d 474 (1977). City of Midland v. Waller, 430 S.W.2d 473 (Tex. 1968). For a period AIA documents did *not* make it *clear* that the clause was *not* a private period of limitations.
6. Give the contractor the first chance to correct the defect. St. Andrews Episcopal Day Sch. v. Walsh Plumbing, *supra* note 47. *See also* Baker Pool Co. v. Bennett, 411 S.W.2d 335 (Ky. App. 1967) where the clause, drafted by the *contractor*, did not state the contractor would be given an opportunity to repair defect and the owner refused to let the contractor inspect. The owner recovered.
7. Represent that contractor will transfer manufacturer's warranty to owner. Greater Richmond Civic Recreation, Inc. v. A. H. Ewing's Sons, Inc., 200 Va. 593, 106 S.E.2d 595 (1959). The purpose may depend upon the law in a particular state, the stage of development of the particular standard form in which it is found or the desire to shift a design risk. But I believe the AIA Warranty or Work Correction clause *today* functions as a *specific* justification to insist the contractor return and correct the work. AIA asserts it gives the owner a right to specific performance as money damages are inadequate. *See* AIA HANDBOOK OF ARCHITECTURAL PRACTICE, D-3, at 18 (1981). But I believe this means a right to *demand* the contractor correct the defect. The clause itself gives the Owner the right to charge the Contractor for correction costs. This is an adequate remedy at law and would generally preclude the equitable remedy of specific performance.

48. Markman v. Hoefer, *supra* note 40.

49. Aubrey v. Helton, 276 Ala. 134, 159 So.2d 377 (1964); Steffek v. Wichers, 211 Kan. 342, 507 P.2d 274 (1973); Handy v. Bliss, 204 Mass. 513, 90 N.E. 864 (1910). See also Annot. 66 A.L.R.2d 570, 573 (1959).

50. School Dist. No. 65R v. Universal Sur. Co. v. Lincoln, *supra* note 45.

combinations of acts, such as issuance of a final certificate, making final payment and taking possession may create waiver.[51]

Courts look at all the facts, including contract clauses, to determine if there has been a manifestation, sometimes described as an intention, that defects are "waived." Where the parties know of a particular defect, occurrence of acts discussed in II,[52] particularly if this is coupled with a settlement of *all* issues,[53] has been held to create a waiver. But the significance of the claim, the usual lack of reliance by the contractor, the ambiguous nature of the acts claimed to create waive and the common use of waiver precluding contract clauses have sharply reduced the possibility of claims being barred. Only rarely does acceptance equal Acceptance.

51. Grass Range High Sch. Dist. v. Wallace Diteman, Inc., 155 Mont. 10, 465 P.2d 814 (1970); Steffek v. Wichers, *supra* note 49.
52. Hemenway Co. Inc. v. Bartex, Inc. of Texas, *supra* note 35; *supra* note 35.
53. *Supra* note 30.