COMMENTS

Implied Warranties for Sales of Water: Have the Courts Applied the Wrong Test?

INTRODUCTION

Courts have long struggled with the issue of whether implied warranties attach to municipal water sales.[1] If a municipality's sale of water constitutes the sale of goods, then Article 2 of the Uniform Commercial Code (U.C.C.) governs the transaction.[2] Under Article 2 of the U.C.C., a contract for the sale of goods contains implied warranties.[3] Under these warranties, municipal waterworks systems would be subject to strict liability for the water they deliver.[4]

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[1] *See, e.g.*, Canavan v. City of Mechanicville, 128 N.E. 882, 883-84 (N.Y. 1920) (holding that water is a good under Uniform Sales Act (U.S.A.), but declining to apply U.S.A.'s warranties); Sternberg v. New York Water Serv. Corp., 548 N.Y.S.2d 247, 248 (App. Div. 1989) (determining that, although water is a good, courts should not imply warranties); Coast Laundry, Inc. v. Lincoln City, 497 P.2d 1224, 1227-28 (Or. Ct. App. 1972) (citing authority that water is a good, but holding that U.C.C. warranties do not attach to its sale).

[2] *See* U.C.C. § 2-102 (1989) (stating that U.C.C. governs transactions in goods).

[3] *See id.* § 2-316 (setting out requirements for waivers of warranties). The U.C.C. provides that, unless expressly waived, all contracts for the sale of goods contain implied warranties of merchantability and fitness for a particular purpose. *See id.* § 2-314 (implying warranty that goods are fit for ordinary purposes); *id.* § 2-315 (implying warranty that goods are fit for particular purpose if seller knew of that purpose); *see also* Gall v. Allegheny County Health Dep't, 555 A.2d 786, 789 (Pa. 1989) (holding that water is a good; therefore, U.C.C. implied warranty of merchantability attaches). *But see Sternberg*, 548 N.Y.S.2d at 248 (holding that, under New York precedent, water is a good, but implied warranties do not attach to its sale).

[4] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 694

A court faces a difficult decision if it determines that the U.C.C. governs municipal water sales. Public policy weighs against imposing strict liability on municipalities.[5] However, the U.C.C.'s express terms compel a court to attach implied warranties and hold a municipality strictly liable for damages caused by contaminated water.[6] Therefore, if a court is not willing to hold a municipality strictly liable for water quality, it must justify its failure to attach the U.C.C. implied warranties.[7]

Courts have hesitated to attach implied warranties to municipal water sales.[8] Contemporary courts have excluded implied

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(5th ed. 1984) (noting that courts hold defendants strictly liable for breaches of implied warranties).

[5] *See infra* note 151 and accompanying text (noting that courts have hesitated to hold municipalities strictly liable on public policy grounds).

[6] *See* U.C.C. § 2-314 (providing that implied warranty of merchantability attaches to contract unless parties expressly exclude or modify warranty).

[7] *See* Canavan v. City of Mechanicville, 128 N.E. 882, 883 (N.Y. 1920) (re-evaluating common law rule that municipality is not insurer of water quality in light of its determination that U.S.A. governed sale); Sternberg v. New York Water Serv. Corp., 548 N.Y.S.2d 247, 248 (App. Div. 1989) (relying upon *Canavan* for proposition that, although municipal sales of water are sales of goods, no warranties are implied); *Gall*, 555 A.2d at 789 (holding that, because water is a good, U.C.C. implied warranties attach to contract for its sale).

A determination that water is a good also affects other aspects of contract disputes arising from municipalities' sales of water. Upon finding that water is a good, courts have applied U.C.C. rules governing contract interpretation, open-price terms, and unconscionability to its sale. *See* Zepp v. Mayor of Athens, 348 S.E.2d 673, 677-69 (Ga. Ct. App. 1986) (holding that U.C.C. provisions regarding open-price terms and unconscionability apply to municipal sale of water); Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro, 412 S.E.2d 910, 916 (N.C. Ct. App. 1992) (holding that parties' course of performance indicated that they had modified their contract for sale of water).

[8] *See, e.g., Canavan*, 128 N.E. at 884 (holding that water is a good, but that U.S.A.'s implied warranties do not apply); *Sternberg*, 548 N.Y.S.2d at 248 (holding that U.C.C. implied warranties do not attach to municipal sales of water); *Gall*, 555 A.2d at 788 (reasoning that governmental entities are not subject to liability unless plaintiff demonstrates negligence); Gall v. Allegheny County Health Dep't, 510 A.2d 926, 928 (Pa. Commw. Ct. 1986) (stating that municipal corporations are not insurers of water), *aff'd in part and rev'd in part*, 555 A.2d 786 (Pa. 1989).

Court decisions involving municipal sales of water show the courts' reluctance to impose strict liability on municipal water authorities. *See infra* notes 82-99 and accompanying text (discussing cases in which plaintiffs alleged that municipal utilities breached U.C.C. implied warranties). Courts uniformly have held that the sale of water is a sale of a good when the case involves a contract dispute. *See Zepp*, 348 S.E.2d at 678 (determining that U.C.C. governs terms of contract for sale of water between municipalities); *Mulberry-Fairplains*, 412 S.E.2d at 915 (applying U.C.C. rules to claim against municipality for charging nonresidents excessive rates). However, in cases involving personal injuries and property damage, courts generally have held that implied warranties do not attach. *See Sternberg*, 548 N.Y.S.2d at 248 (holding that, under prior cases, implied warranties do not attach to

warranties by citing inapposite authority[9] or by not directly addressing the U.C.C.'s application to sales of water.[10] These courts have acknowledged that public policy requires municipal liability for any negligence in maintaining municipal water systems.[11] However, the same courts have concluded that municipalities are not insurers of water quality and thus are not strictly liable when they deliver contaminated water.[12] Therefore, the courts have determined that, absent negligence, municipalities should not bear the costs of a contaminated water supply.[13]

This Comment examines the question of whether municipal water sales are sales of goods governed by Article 2 of the U.C.C. It argues that courts have not applied the correct test to determine whether the U.C.C. governs these sales. Part I presents the historical treatment of the sale of water under the pre-

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municipal water sales); Coast Laundry, Inc. v. Lincoln City, 497 P.2d 1224, 1228 (Or. Ct. App. 1972) (holding that implied warranties do not apply to water sales).

One Pennsylvania court held that U.C.C. implied warranties attach to municipal water sales. *Gall*, 555 A.2d at 789. However, under Pennsylvania's governmental immunity statutes, the plaintiff must demonstrate negligence to successfully sue a public entity. *Id.* at 788. Therefore, the court's holding did not subject the municipality to strict liability. *See infra* notes 98-99 and accompanying text (discussing limits of *Gall* court's holding).

[9] *See, e.g., Sternberg*, 548 N.Y.S.2d at 248 (relying on pre-U.C.C. case for proposition that U.C.C. governs municipal water sales).

[10] *See Coast Laundry*, 497 P.2d at 1228 (relying on secondary authority unrelated to U.C.C. to support determination that implied warranties do not attach to municipal water sales).

[11] *See Canavan*, 128 N.E. at 883 (recognizing that municipalities have duty of reasonable care); *see also Sternberg*, 548 N.Y.S.2d at 248 (finding that *Canavan*'s holding applies to U.C.C.). A Pennsylvania court has reasoned that the legislature passed sovereign immunity laws to limit municipal liability to injuries resulting from a municipality's negligence. *Gall*, 510 A.2d at 929.

[12] *See Coast Laundry*, 497 P.2d at 1228 (holding that, because municipal corporation is not insurer of water, U.C.C. implied warranties do not attach to municipal water sales); *see also Sternberg*, 548 N.Y.S.2d at 248 (holding that implied warranties do not attach to municipal sales of water); *Gall*, 555 A.2d. at 788 (noting that Pennsylvania's governmental immunity statute requires that plaintiffs establish negligence before pursuing claim for breach of warranty).

In holding that implied warranties do not attach to sales of water, the *Coast Laundry* court relied upon the policy set forth in 56 AM. JUR., *Waterworks & Water Companies* (1968) § 79 (currently found at 78 AM. JUR. 2D § 41 (1975)). *Coast Laundry*, 497 P.2d at 1228. AM. JUR. § 79 stated that a municipal waterworks system is not an insurer of water. *Id.* at 1228.

[13] *See Canavan*, 128 N.E. at 884 (stating that municipalities cannot eliminate all water contaminants, and public does not expect municipality to insure water quality); *see also Sternberg*, 548 N.Y.S.2d at 248 (holding that *Canavan* rationale applies in U.C.C. context); *Coast Laundry*, 497 P.2d at 1228 (reasoning that municipality is not insurer of water, and therefore municipality is not liable unless negligent).

U.C.C. statute of frauds and the Uniform Sales Act.[14] It also discusses the different tests that courts currently apply to determine whether providing a public utility, such as water, is a sale of goods.[15] Part II discusses the current case law regarding municipal sales of water.[16] Part III proposes that courts have failed to apply the correct test in addressing such sales.[17] It argues that municipalities primarily provide a service by delivering water; therefore, the U.C.C. should not govern.[18]

I. BACKGROUND

In deciding whether utilities provide goods or services, courts have applied two different tests:[19] the *Helvey* test[20] and the *Bonebrake* test.[21] Courts have also relied on pre-U.C.C. decisions holding that water is a good.[22] These tests and pre-U.C.C. decisions form the basis for recent court holdings that municipal water sales are sales of goods.[23]

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[14] *See infra* notes 48-68 and accompanying text (discussing pre-U.C.C. decisions regarding municipal sales of water).

[15] *See infra* notes 19-47 and accompanying text (contrasting test based on subject matter of contract with test based on predominant factor in contract).

[16] *See infra* notes 72-78 and accompanying text (examining rationale behind courts' decisions to apply U.C.C. to water sales).

[17] *See infra* notes 123-48 and accompanying text (proposing that U.C.C. does not govern sales of water because transactions are predominantly for provision of services).

[18] *See infra* notes 145-48 and accompanying text (arguing that municipal sales of water is service and therefore U.C.C. does not govern).

[19] *See infra* notes 44-47 and accompanying text (discussing decisions that formed basis for determining that water is a good).

[20] *See* Helvey v. Wabash County REMC, 278 N.E.2d 608, 610 (Ind. Ct. App. 1972).

[21] *See* Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974).

[22] *See* Zepp v. Mayor of Athens, 348 S.E.2d 673, 676-77 (Ga. Ct. App. 1986); Sternberg v. New York Water Serv. Corp., 548 N.Y.S.2d 247, 248 (App. Div. 1989) (relying on decision under U.S.A.; holding that municipal sales of water are sales of goods, but implied warranties do not attach); Coast Laundry, Inc. v. Lincoln City, 497 P.2d 1224, 1227-28 (Or. Ct. App. 1972) (discussing holdings under U.S.A. and U.C.C.); *infra* notes 72-78 and accompanying text (discussing courts' bases for holding that water is a good).

[23] *See Zepp*, 348 S.E.2d at 676-77 (analyzing pre-U.C.C. authority and then applying *Helvey* test); Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro, 412 S.E.2d 910, 915 (N.C. Ct. App. 1992) (relying on *Zepp* court's application of *Helvey* test); Gall v. Allegheny County Health Dep't, 555 A.2d 786, 789 (Pa. 1989) (applying *Helvey* test to water and relying on *Zepp* court's holding).

A. Historical Treatment of the Sale of Water Under the Uniform Sales Act

The issue of whether municipal sales of water are sales of goods has its roots in pre-U.C.C. decisions. Courts addressing the issue continue to rely on decisions under the pre-U.C.C. statute of frauds and the Uniform Sales Act (U.S.A.).[24] Specifically, courts cite two early cases establishing that water is a good under the statute of frauds and the U.S.A.[25]

In *Mayor of Jersey City v. Town of Harrison*,[26] the Supreme Court of New Jersey considered the pre-U.C.C. statute of frauds to a sale of water.[27] In examining a contract for municipal sales of water, the court held that water is a good within the meaning of the statute of frauds.[28] The court reasoned that no difference exists between sales of bottled water and a municipality's sale of water.[29] The court concluded that bottled water is a good; therefore, the water a utility delivers through pipes must also be a good.[30]

In the second of these cases, *Canavan v. City of Mechanicville*,[31] the plaintiff sued the City of Mechanicville for

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[24] *See Zepp*, 348 S.E.2d at 676-77 (stating that analysis begins with pre-U.C.C. case of *Canavan v. City of Mechanicville*); Sternberg v. New York Water Serv. Corp., 548 N.Y.S.2d 247, 248 (App. Div. 1989) (finding that holding of *Canavan* is controlling); Coast Laundry, Inc. v. Lincoln City, 497 P.2d 1224, 1227 (Or. Ct. App. 1972) (discussing implications of *Canavan*).

[25] *See* Mayor of Jersey City v. Town of Harrison, 58 A. 100, 101 (N.J. 1904) (holding that water is a good for purposes of common law statute of frauds), *aff'd*, 62 A. 765 (N.J. 1905); Canavan v. City of Mechanicville, 128 N.E. 882, 883 (N.Y. 1920) (holding that water is a good under U.S.A.).

[26] 58 A. 100 (N.J. 1904), *aff'd*, 62 A. 765 (N.J. 1905).

[27] *See id.* at 101. In *Mayor of Jersey City*, Jersey City was negotiating a contract for the sale of water with the town of Harrison. *Id.* Harrison passed and then rescinded a resolution that authorized the clerk to execute a contract for the purchase of water. *Id.* Jersey City tried to enforce the contract, and Harrison raised the defense of the statute of frauds. *Id.* The court reasoned that the contract for water was for "goods, wares, and merchandise," as required for application of the New Jersey statute of frauds. *Id.* The court then dismissed the complaint, holding that Harrison's resolution did not constitute a sufficient writing to create a contract under the statute. *Id.*

[28] *See id.* A contract involving "goods, wares, and merchandise," that the parties did not complete within a year, fell within the statute of frauds. *Id.*

[29] *See id.*

[30] *See id.*

[31] 128 N.E. 882 (N.Y. 1920).

supplying water contaminated with typhoid fever bacteria.[32] The New York Supreme Court held that water is a good, reasoning that water fits within the U.S.A.'s definition of goods.[33] Further, the court cited the *Mayor of Jersey City* court's determination that municipal sales of water are analogous to sales of bottled water.[34]

After determining that water is a good under the U.S.A., the *Canavan* court addressed the applicability of the U.S.A.'s implied warranties.[35] Because it found the transaction was a sale of goods, the court should have attached the U.S.A.'s implied warranties to the contract.[36] Despite the express language in the U.S.A., the *Canavan* court was unwilling to do so.[37] Therefore, the court turned to tort actions to justify its decision that implied warranties do not attach.[38] Under these common law decisions, courts did not hold municipalities liable for impurities in the water supply unless the municipalities had been negligent.[39] Following this precedent, the court

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[32] *See id.* at 882.

[33] *See id.* at 883. In holding that water is a good within the meaning of the U.S.A., the *Canavan* court cited the definition of goods in the U.S.A. and noted that municipal water sales through a waterworks system are sales of goods. *See id.* The U.S.A. defines "goods" as including "all chattels personal other than things in action and money." UNIF. SALES ACT § 76 (1906).

[34] *See Canavan*, 128 N.E. at 883. In addition to *Mayor of Jersey City*, the *Canavan* court relied upon *Oakes Manufacturing Co. v. City of New York*, 99 N.E. 540 (N.Y. 1912). *Id.* The *Oakes* decision, however, only addressed whether a plaintiff could sue a municipal waterworks system for negligence. *Oakes*, 99 N.E. at 541-42.

[35] *Canavan*, 128 N.E. at 883-84.

[36] *See id.* at 884-85 (Pound, J., dissenting) (arguing that because water is a good, U.S.A. implied warranties must attach).

[37] *Id.* at 884. The court noted that the U.S.A. warranty required that the buyer inform the seller of the purpose for the purchase of water. *Id.* at 883. Here, the plaintiffs did not notify the seller that they intended to consume the water. *Id.* Additionally, the court noted that most of the water that a municipal system sells is not for human consumption. *Id.* at 884. The court referred to a series of cases which indicated that municipalities need not insure that water is safe to consume. *Id.* at 883.

[38] *Id.* at 883.

[39] *See, e.g.*, Hayes v. Torrington Water Co., 92 A. 406, 407 (Conn. 1914) (sustaining cause of action against municipality because municipality was negligent); Jones v. Mount Holly Water Co., 93 A. 860, 861 (N.J. 1915) (holding that municipality may be found liable for damages because plaintiff established that municipality was negligent); Danaher v. City of Brooklyn, 23 N.E. 745, 745-46 (N.Y. 1890) (dismissing action because plaintiff failed to allege that city was negligent); Buckingham v. Plymouth Water Co., 21 A. 824, 825 (Pa. 1891) (holding that plaintiff must demonstrate that municipality was negligent to sustain cause of action).

determined that implied warranties do not attach to the sale of water, despite its status as a good under the U.S.A.[40]

Mayor of Jersey City and *Canavan* therefore provide modern courts with a framework for holding that water is a good. Both decisions establish the precedent of looking to the physical nature of water to support this determination.[41] Additionally, *Canavan* provides authority for exempting sales of water from statutory implied warranties.[42] These cases, together with the *Helvey* test, have formed the basis for current decisions holding that municipal sales of water are sales of goods.[43]

B. The Helvey *and* Bonebrake *Tests*

Courts have applied two different tests to determine whether Article 2 of the U.C.C. governs utilities' sales of water, gas, and electricity. The *Helvey* test looks to the definition of goods in U.C.C. section 2-105[44] to determine whether water meets that section's requirements.[45] The *Bonebrake* test determines whether a contract is predominantly for the sale of services or for goods.[46] Under the latter test, U.C.C. provisions govern a contract only if the contract is predominantly for the sale of goods.[47]

The *Canavan* court further emphasized the difficulty that municipalities face in maintaining the purity of their water systems. *Canavan*, 128 N.E. at 884. The court noted that the available sources of water are limited. *Id.* A city cannot police such sources to the degree necessary to protect the water from all contamination. *Id.*

[40] *Canavan*, 128 N.E. at 884.

[41] *See* Mayor of Jersey City v. Town of Harrison, 58 A. 100, 101 (N.J. 1904) (reasoning that, because bottled water is a good, water sold by municipalities is also a good); *Canavan*, 128 N.E. at 883 (citing *Mayor of Jersey City* for proposition that bottled water and piped water are both goods).

[42] *Canavan*, 128 N.E. at 884.

[43] *See infra* notes 72-78 and accompanying text (discussing modern rationale for determining municipal water sales are sales of goods).

[44] U.C.C. § 2-105 (1989) defines "goods" as "all things . . . which are movable at the time of identification to the contract." *Id.* § 2-105(1). Subsection (2) specifies that such goods must be both existing and identified. *Id.* § 2-105(2).

[45] *See* Helvey v. Wabash County REMC, 278 N.E.2d 608, 610 (Ind. Ct. App. 1972) (reasoning that electricity is a good because it meets physical description of goods in U.C.C. § 2-105).

[46] Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974).

[47] *Id.*

1. The *Helvey* Test

U.C.C. section 2-105 sets forth the definition of "goods" for the purposes of Article 2 of the U.C.C. Pursuant to this section, commodities are goods if they are movable at the time the contracting parties identify them to the contract.[48] Most courts holding that municipal water sales are sales of goods have based their conclusion, at least in part, on this definition.[49]

The Indiana Court of Appeals, in *Helvey v. Wabash County REMC*,[50] was one of the first courts to address whether the delivery of a utility constitutes a sale of goods under the U.C.C.[51] In *Helvey*, the plaintiff sued his local electricity cooperative for damages resulting from the delivery of excess voltage to his residence.[52] The court determined that the transaction was a sale of goods governed by the U.C.C.[53]

In making this determination, the *Helvey* court analyzed the nature of electricity in light of the U.C.C.'s definition of

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[48] U.C.C. § 2-105(1).

[49] *See* Zepp v. Mayor of Athens, 348 S.E.2d 673, 677-78 (Ga. Ct. App. 1986) (considering water analogous to electricity and adopting reasoning of *Helvey* court to hold that water meets requirements of U.C.C. § 2-105); Gall v. Allegheny County Health Dep't, 555 A.2d 786, 789 (Pa. 1989) (holding that, under *Helvey* court's characterization of U.C.C. § 2-105, water is a good); *cf.* Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro, 412 S.E.2d 910, 915 (N.C. Ct. App. 1992) (relying on *Zepp* court's analysis that water is a good under *Helvey* test).

[50] 278 N.E.2d 608 (Ind. Ct. App. 1972).

[51] *See* Gary D. Spivey, Annotation, *Electricity, Gas, or Water Furnished by Public Utility as "Goods" Within Provisions of Uniform Commercial Code, Article 2 on Sales*, 48 A.L.R.3d 1060, 1062 (1973) (indicating that *Helvey* was second published decision addressing issue of whether gas, water, and electricity are goods within meaning of Article 2 of U.C.C.). The first decision stating that public utilities engage in the sale of goods was *Gardiner v. Philadelphia Gas Works*, 197 A.2d 612 (Pa. 1964). The *Gardiner* court discussed whether the U.C.C. governed a utility contract for the sale of gas through an underground conduit. *Id.* at 613. Gas had escaped from the underground pipes and exploded, injuring the plaintiffs. *Id.* at 612.

The plaintiffs filed their complaint more than two years after the date of the accident. *Id.* Therefore, they did not meet the state's two-year statute of limitations for actions regarding personal injuries. *Id.* at 613. The defendant, Philadelphia Gas Works, thus objected to the complaint on statute of limitations grounds. *Id.* at 612.

The *Gardiner* court determined that the sale in question was a sale of goods under the U.C.C. *Id.* at 614. Therefore, the four-year statute of limitations set forth in U.C.C. section 2-275 controlled. *Id.* The *Gardiner* court did not discuss the nature of the product sold; it instead relied on the underlying policy of uniformity set forth in U.C.C. section 1-102. *Id.* at 613.

[52] *Helvey*, 278 N.E.2d at 610.

[53] *See id.* at 609-10.

goods.[54] The court articulated a test for determining whether the subject matter of a contract is a good.[55] Under the *Helvey* test, electricity is a good if it is simultaneously "existing" and "movable."[56] Subsequent courts have used this test to determine whether municipal sales of water are sales of goods.[57]

2. The *Bonebrake* Predominant Factor Test

Even if a court determines that water is a good under the *Helvey* test, the U.C.C. does not necessarily govern the transaction.[58] Article 2 of the U.C.C. applies only to transactions in goods;[59] the U.C.C. does not govern contracts for the provision of services.[60] Therefore, in transactions that involve both goods and services, a court must apply a second test to determine whether the U.C.C. provides the governing law.[61]

In *Bonebrake v. Cox*,[62] the United States Court of Appeals for the Eighth Circuit articulated a test for a transaction involving both goods and services.[63] The *Bonebrake* court stated that the U.C.C.'s applicability to a sale turns on the predominant factor in the transaction.[64] Common law rules govern the transaction if the predominant factor is the rendition of a service, even if

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[54] *See id.*

[55] *See id.* at 610. The majority of courts have used the *Helvey* test to determine whether the sale of water is a sale of goods within the meaning of the U.C.C. *See infra* notes 70-76 and accompanying text (discussing test that majority of courts have applied to sales of water).

[56] *Helvey*, 278 N.E.2d at 610. The *Helvey* court determined that electricity is both existing and movable and is therefore a good. *Id.*

[57] *See* Zepp v. Mayor of Athens, 348 S.E.2d 673, 677-78 (Ga. Ct. App. 1986) (noting that water, like electricity, meets test set forth in *Helvey*); Gall v. Allegheny County Health Dep't, 555 A.2d 786, 789 (Pa. 1989) (holding that under *Helvey* definition, water is a good); *see also* Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro, 412 S.E.2d 910, 915 (N.C. Ct. App. 1992) (relying on *Zepp* court's decision that water is a good).

[58] *See* Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (stating that courts should apply predominant factor test when transaction involves both goods and services).

[59] U.C.C. § 2-102 (1989).

[60] *Bonebrake*, 499 F.2d at 960.

[61] *See id.*

[62] 499 F.2d 951 (8th Cir. 1974). In *Bonebrake*, the court analyzed whether a contract to replace bowling alley equipment was for services. *Id.* at 957-58. Although the contract in question was mixed, the court found that the contract was predominantly for the sale of goods. *Id.* at 960.

[63] *See id.* at 958-59.

[64] *See id.* at 960.

there is an incidental sale of goods.[65] However, if the transaction's primary purpose is the sale of goods, the U.C.C. governs the transaction regardless of any incidental services.[66] While courts have applied the *Bonebrake* predominant factor test to sales of electricity,[67] they have not applied this test to municipal sales of water.[68]

II. STATE OF THE LAW

Only five published decisions have discussed whether municipal sales of water are sales of goods within the meaning of Article 2 of the U.C.C.[69] Of these five decisions, four courts held

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[65] *See id.* at 958-60.

[66] *See id.* at 960.

[67] *See* Cincinnati Gas & Elec. Co. v. Goebel, 28 Ohio Misc. 2d 4, 4-5 (Hamilton County Mun. Ct. 1986). The *Goebel* court set forth the test of whether the predominant factor in providing electricity is the rendition of services, with an incidental sale of goods. *Id.* If the predominant factor in the transaction is the sale of goods, the U.C.C. governs the contract. *Id.* However, if the provision of services is the predominant factor in the transaction, the U.C.C. does not govern that transaction. *Id. Goebel* was a case of first impression in Ohio. *Id.* After examining authorities from other states, the *Goebel* court held that electricity which has passed through a household meter is a good. *Id.* The *Goebel* court applied both the predominant factor test and the *Helvey* test. *Id.*

[68] *See, e.g.*, Zepp v. Mayor of Athens, 348 S.E.2d 673, 677-78 (Ga. Ct. App. 1986) (reasoning that water is a good because it is identifiable and movable); Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro, 412 S.E.2d 910, 915 (N.C. Ct. App. 1992) (basing decision that water is a good on water's flow through meter); Gall v. Allegheny County Health Dep't, 555 A.2d 786, 788 (Pa. 1989) (holding that water is a good based on its tangibility and movability); *see also infra* notes 72-78 and accompanying text (listing courts which have held that water is a good and reasons for their holdings).

[69] *Zepp*, 348 S.E.2d at 677; Sternberg v. New York Water Serv. Corp., 548 N.Y.S.2d 247, 248 (App. Div. 1989); *Mulberry-Fairplains*, 412 S.E.2d at 915; Coast Laundry, Inc. v. Lincoln City, 497 P.2d 1224, 1227-28 (Or. Ct. App. 1972); *Gall*, 555 A.2d at 789 (Pa. 1989).

Additionally, one court excluded a claim for breach of implied warranties but did not determine whether water is a good or a service. Moody v. City of Galveston, 524 S.W.2d 583, 586 (Tex. App. 1975). In *Moody*, gas in the water lines of the plaintiff's residence caused the kitchen faucet to catch fire. *Id.* at 585. The fire injured the plaintiff when she turned off the faucet to stop the flow of gas. She sued the defendant, City of Galveston, for breach of U.C.C. implied warranties. *Id.*

Following a verdict for the defendant, the plaintiff appealed the trial court's refusal to submit instructions on implied warranties to the jury. *Id.* at 586. The *Moody* court found that the proposed jury instructions were unduly confusing and not in proper form. Therefore, the court affirmed the exclusion of the jury instructions without determining whether the transaction was a sale of goods under the U.C.C. *Id.*

that the delivery of water by a municipal waterworks system is a sale of goods.[70] One court, however, impliedly held that such a sale is not a sale of goods.[71]

A. The Majority of Courts Have Held That Water Is a Good Under the U.C.C.

Three courts espousing the majority view have employed the same test to determine if water is a good.[72] The courts in *Zepp v. Mayor of Athens*,[73] *Mulberry-Fairplains Water Ass'n v. Town of North Wilkesboro*,[74] and *Gall v. Allegheny County Health Department*[75] each analyzed whether water fits within the U.C.C.'s definition of goods and held that it does. The *Gall* and *Zepp* courts applied the *Helvey* test, determining that water is a good because it is simultaneously existing and movable.[76] Relying on the *Zepp* decision, the *Mulberry-Fairplains* court emphasized that movability is the core element in the U.C.C.'s definition of goods.[77] Reasoning that water is movable, the *Mulberry-Fairplains* court also held that water is a good.[78]

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[70] *Zepp*, 348 S.E.2d at 678; *Sternberg*, 548 N.Y.S.2d at 247; *Mulberry-Fairplains*, 412 S.E.2d at 915; *Gall*, 555 A.2d at 789.

[71] *Coast Laundry*, 497 P.2d at 1228.

[72] *See infra* notes 73-78 and accompanying text (noting that *Gall*, *Zepp*, and *Mulberry-Fairplains* courts each determined that water is a good because it is movable). A fourth case is a New York appellate court decision that relied on the *Canavan* court's determination that water is a good under the U.S.A. *Sternberg*, 548 N.Y.S.2d at 248. The *Sternberg* court did not address the differences between the definitions of goods under the U.S.A. and the U.C.C. *Id.*

[73] 348 S.E.2d 673 (Ga. Ct. App. 1986).

[74] 412 S.E.2d 910 (N.C. Ct. App. 1992).

[75] 555 A.2d 786 (Pa. 1989).

[76] *Zepp*, 348 S.E.2d at 677-78; *Gall*, 555 A.2d at 789. The *Zepp* court went on to cite the *Helvey* court's reasoning that commodities which a meter can measure are existing and movable. *Zepp*, 348 S.E.2d at 678.

[77] *Mulberry-Fairplains*, 412 S.E.2d at 915. The *Mulberry-Fairplains* court relied upon a comment accompanying U.C.C. section 2-105, which states:

> The phraseology of the prior uniform statutory provision has been changed so that:
>
> > The definition of goods is based on the concept of movability and the term "chattels personal" is not used. It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.

U.C.C. § 2-105 cmt. 1 (1989).

[78] *Mulberry-Fairplains*, 412 S.E.2d at 915.

B. Courts Holding That Water Is a Good Have Hesitated to Impose Implied Warranties

The issue of implied warranties arose in two of the four decisions holding that water is a good under Article 2 of the U.C.C.[79] In both cases, the courts unequivocally held that a municipal sale of water is a sale of goods within the meaning of Article 2.[80] However, neither court subjected the municipality to strict liability.[81]

In *Sternberg v. New York Water Service Corp.*,[82] the municipal defendant treated water with an anti-oxidant.[83] Excessive amounts of the anti-oxidant in the water damaged the plaintiff's water heating systems.[84] The plaintiff thereafter sued the water service corporation for breach of U.C.C. implied warranties.[85]

The *Sternberg* court affirmed the lower court's dismissal of the implied warranties claim, holding that implied warranties do not attach to municipal water sales.[86] The court relied on the *Canavan* court's determination that, although water is a good,

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[79] *See* Sternberg v. New York Water Serv. Corp., 548 N.Y.S.2d 247, 248 (App. Div. 1989) (concluding that water is a good but that implied warranties do not apply to municipal water sales); *Gall*, 555 A.2d at 789-90 (holding that, as water is a good, U.C.C. implied warranty of merchantability attaches to its sale).

The *Zepp* and *Mulberry-Fairplains* courts determined that water is a good. *See Zepp*, 348 S.E.2d at 677 (holding that Article 2 governs municipal sales of water); *Mulberry-Fairplains*, 412 S.E.2d at 915 (noting that sale of water is sale of a good). However, the plaintiffs did not raise the issue of implied warranties in these cases. In *Zepp*, the plaintiffs argued that the U.C.C. governed a contract for the sale of water between municipalities. *Zepp*, 348 S.E.2d at 676. In *Mulberry-Fairplains*, the court determined that, because the U.C.C. governed the contract, the parties could modify the contract without consideration. *Mulberry-Fairplains*, 412 S.E.2d at 915. Further, the court held that U.C.C. rules governed contract interpretation. *Id.* at 916-17.

[80] *See infra* notes 82-97 and accompanying text (discussing holdings of *Sternberg* and *Gall* courts).

[81] *See infra* notes 149-70 and accompanying text (describing limitations that *Sternberg* and *Gall* courts placed upon implied warranties).

[82] 548 N.Y.S.2d 247 (App. Div. 1989).

[83] *See id.* at 248.

[84] *See id.*

[85] *See id.*

[86] *See id.*

implied warranties do not attach to its sale.[87] The *Sternberg* court, however, did not mention that *Canavan* was decided under the U.S.A. rather than the U.C.C.[88]

In *Gall v. Allegheny County Health Department*,[89] the Supreme Court of Pennsylvania discussed the issue of implied warranties more extensively. *Gall* is the only reported decision holding that U.C.C. implied warranties attach to municipal sales of water.[90] However, Pennsylvania's governmental immunity statute prevented the *Gall* court from imposing strict liability on the municipality.[91]

In *Gall*, the local municipal waterworks system delivered water which was contaminated with giardia,[92] an intestinal parasite.[93] The plaintiffs drank the water and contracted giardiasis.[94] They sued the water authority for breach of U.C.C. implied warranties.[95] In addressing the plaintiffs' claim, the *Gall* court applied the *Helvey* test.[96] Under this test, the court determined that water is a good, and that the U.C.C. implied warranty of merchantability attaches to its sale.[97]

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[87] *See id.*

[88] *See id.*

[89] 555 A.2d 786 (Pa. 1989).

[90] Search of LEXIS, States Library, Mega File (Jan. 31, 1997).

[91] *See infra* notes 98-99 and accompanying text (discussing Pennsylvania's governmental immunity statute).

[92] *Gall*, 555 A.2d at 787.

[93] THOMAS LATHROP STEDMAN, ILLUSTRATED STEDMAN'S MEDICAL DICTIONARY 660 (5th unabridged lawyer's ed. 1982).

[94] *Gall*, 555 A.2d at 787.

[95] *See id.*

[96] *See id.* at 789.

[97] *See id.* The court emphasized the implied warranty's limits, noting that the warranty requires only that the goods be suitable for ordinary use. *See id.* at 789-90. Therefore, goods need not be the best quality. They only have to be of reasonable quality for anticipated use. *See id.*

Additionally, the *Gall* court held that the U.C.C. implied warranty of fitness for a particular purpose does not apply to sales of water. *See id.* at 790. The court noted that this warranty requires that a buyer intend to use the product for something other than its ordinary purpose. *See id.* Further, this warranty only attaches when the seller has reason to know of the buyer's anticipated use of the goods. *See id.* (citing U.C.C. § 2-315, which applies warranty only when seller knew of buyer's particular purpose for purchasing goods). In municipal sales of water to residential consumers, the consumer ordinarily does not indicate his intent to use the water for a particular purpose. Therefore, the implied warranty of fitness normally does not attach to municipal water sales. *See id.*

Pennsylvania's governmental immunity statute, however, mitigated the impact of this holding.[98] Under Pennsylvania law, plaintiffs suing a municipal utility are required to allege negligence in their complaint.[99] Because plaintiffs can only pursue their U.C.C. claims against the municipality if they show negligence, the court's holding that implied warranties attach to such sales does not subject Pennsylvania municipalities to strict liability. The implied warranties attach only if the plaintiffs demonstrate negligence.

The above cases illustrate that even when courts have held that the U.C.C. governs water sales, they have refused to impose strict liability on municipalities. The *Sternberg* court avoided the application of implied warranties by relying on a U.S.A. case rather than on U.C.C. precedent.[100] In *Gall*, a Pennsylvania court broke new ground when it held that U.C.C. implied warranties attach to municipal water sales.[101] However, under the state governmental immunity statute, the municipality was not strictly liable for the injuries caused by tainted water.[102]

C. One Court Has Impliedly Held That the U.C.C. Does Not Govern Sales of Water by a Municipal System

Only the Oregon Court of Appeals has indicated that the U.C.C. does not govern municipal sales of water.[103] In *Coast Laundry, Inc. v. Lincoln City*,[104] the defendant, Lincoln City, Oregon, delivered water containing tar particles to the plaintiff, Coast Laundry.[105] The tar damaged the plaintiff's laundry busi-

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[98] *See id.* at 788.

[99] *See id.* The plaintiffs complied with this statute by alleging that the water authority had failed to take reasonable steps to prevent the contamination. Therefore, the court allowed the plaintiffs to maintain their action. *Id.*

[100] *See supra* notes 82-88 and accompanying text (discussing *Sternberg* holding).

[101] *See supra* notes 89-99 and accompanying text (discussing *Gall* court's decision).

[102] *See supra* notes 98-99 and accompanying text (discussing Pennsylvania's governmental immunity statute).

[103] *See supra* notes 72-78 and accompanying text (providing overview of decisions regarding municipal sales of water).

[104] 497 P.2d 1224 (Or. Ct. App. 1972).

[105] *See id.* at 1225.

ness.[106] The plaintiff sued Lincoln City,[107] arguing that U.C.C. implied warranties attach to municipal water sales.[108]

At the trial, the judge did not allow the plaintiff to argue that implied warranties attached to its purchase of water.[109] The jury returned a verdict for the defendant.[110] The plaintiff appealed on the ground that the judge should have submitted the issue of implied warranties to the jury.[111]

In examining whether implied warranties attach to municipal water sales, the *Coast Laundry* court first discussed whether water is a good. The court analyzed the U.C.C.'s definition of goods,[112] noting its emphasis on movability.[113] Without further explanation, the court determined that because municipalities are not insurers of water, implied warranties do not attach to municipal water sales.[114]

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[106] *See id.* at 1226.

[107] *See id.* at 1225.

[108] *See id.* at 1226. At the jury trial, the judge did not allow the jury to consider the application of U.C.C. implied warranties. *See id.* at 1225. The only issue that the judge submitted to the jury was whether Lincoln City was negligent. *See id.* The jury found that Lincoln City was not negligent and returned a verdict for the defendant. *See id.*

[109] *See id.* at 1225.

[110] *See id.*

[111] *See id.*

[112] *See id.* at 1227-28. Before addressing the definition of goods in the U.C.C., the court inconclusively discussed pre-U.C.C. precedent. *Id.* at 1226-28. The *Coast Laundry* court emphasized the decision in *Canavan*, noting that the *Canavan* court had held that water is a good under the U.S.A. *See id.* at 1227. The *Coast Laundry* court quoted the *Canavan* court for the proposition that courts should not hold a municipality strictly liable for contaminated water. *Id.*

[113] *See id.* at 1227. Although the U.S.A. provided the initial model for the U.C.C., the drafters of the U.C.C. modified the U.S.A.'s definition of goods to emphasize movability. The U.S.A. defined goods as "all chattels personal other than things in action and money." UNIF. SALES ACT § 76 (1906). The U.C.C.'s initial drafts incorporated this definition. *See* FED. SALES ACT § 67 (Report and Second Draft, 1937) (incorporating U.S.A. definition of goods into draft that formed basis for U.C.C.). In the 1941 precursor to the U.C.C., the drafters rewrote this definition. *See* REVISED UNIF. SALES ACT § 1 (Report and Second Draft, 1941) (modifying definition of goods). In this version, the drafters defined goods as "movables" rather than "chattels personal." *Id.* The U.C.C. currently defines goods as "all things . . . which are movable at the time of identification to the contract." U.C.C. § 2-105 (1989).

The Official Comment to U.C.C. section 2-105 discusses these changes. The *Coast Laundry* court quoted a portion of comment 1, emphasizing that "'[t]he definition of goods . . . *is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.*'" *Coast Laundry*, 497 P.2d at 1227 (alteration in original).

[114] *Coast Laundry*, 497 P.2d at 1228. In its discussion, the *Coast Laundry* court listed authorities supporting the proposition that sales of electricity and natural gas by utilities

Courts and commentators have had difficulty explaining the *Coast Laundry* court's decision and rationale.[115] Commentators disagree about whether the *Coast Laundry* court actually determined that the transaction was a sale of goods.[116] As did the courts espousing the majority rule, the *Coast Laundry* court discussed the physical nature of water.[117] However, although water meets U.C.C. section 2-105's physical requirement of movability, the court did not hold that water is a good.[118] Therefore, the court did not base its decision on the physical nature of water. One possible rationale for the court's holding is that it correctly applied the *Bonebrake* predominant factor test to municipal water sales.[119]

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are sales of goods to which implied warranties attach. *Id.* at 1227. Nonetheless, the *Coast Laundry* court held that U.C.C. warranties do not attach to sales of water. *Id.* at 1228.

[115] *See* Zepp v. Mayor of Athens, 348 S.E.2d 673, 677 (Ga. Ct. App. 1986) (stating that *Coast Laundry* court concluded that sale of water is not sale of goods); Anthony J. Bellia, Jr., Note, *Lead Poisoning in Children: A Proposed Legislative Solution to Municipal Liability for Furnishing Lead-Contaminated Water*, 68 NOTRE DAME L. REV. 399, 414-15 (1992) (stating that *Coast Laundry* held that sale of water does not constitute sale of goods). One court interpreted the *Coast Laundry* decision as specifically holding that water is not movable. *Zepp*, 348 S.E.2d at 677.

[116] *Compare* Jane P. Mallor, *Utility "Services" Under the Uniform Commercial Code: Are Public Utilities in for a Shock?*, 56 NOTRE DAME L. REV. 89, 95 (1980) (noting that only basis for inferring that *Coast Laundry* court held water is not a good is court's reference to U.C.C. § 2-105 cmt. 1) *with* Bellia, *supra* note 115, at 414-15 (stating that *Coast Laundry* court held that sale of water by municipality is not sale of goods).

The *Coast Laundry* court did not explicitly base its holding upon a determination that the sale in question was predominantly for services. However, unless the court found that water was not movable, its reasoning eliminates other possibilities. The court's holding suggests either that it found the defendant provided a service, or it determined that water is not movable. *See Zepp*, 348 S.E.2d at 677 (concluding that *Coast Laundry* court found that water is not movable).

[117] *Coast Laundry*, 497 P.2d at 1227-28 (noting that drafters of U.C.C. based definition of goods on movability).

[118] *See* U.C.C. § 2-105 (defining "goods" as movables); *Zepp*, 348 S.E.2d at 677-78 (determining that water is a good because it is simultaneously existing and movable); Mulberry-Fairplains Water Ass'n v. Town of N. Wilkesboro, 412 S.E.2d 910, 915 (N.C. Ct. App. 1992) (reasoning that water is a good because it is movable); Gall v. Allegheny County Health Dep't, 555 A.2d 786, 789 (Pa. 1989) (holding that water is a good under U.C.C. definition).

[119] *See infra* notes 123-48 and accompanying text (arguing that municipal water sales are services which U.C.C. does not govern).

While the *Coast Laundry* decision seems irrational in light of the *Helvey* test, it comports with the model solution this Comment provides. The *Coast Laundry* court cited an Oregon statute which states that prior to appropriation, the public owns all water in the state. *Coast Laundry*, 497 P.2d at 1226. Therefore, the municipality was delivering water that

III. MODEL SOLUTION

Most courts have simply looked to the nature of water in determining that it is a good.[120] Courts have considered water's movability as the key factor in this analysis. However, if courts determine that water is a good, they must either hold municipalities strictly liable for contamination or ignore their duty to apply the U.C.C. as written.[121] The New Jersey Supreme Court suggests a solution to this dilemma by characterizing municipal water sales as service transactions. With this characterization, courts may apply the *Bonebrake* predominant factor test to hold that the U.C.C. does not govern municipal water sales.[122]

A. Municipalities Provide the Service of Appropriation and Distribution of the Public's Water

Water, being a product of nature uniquely necessary to being,[123] has long received special treatment under the law.[124]

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belonged to the public. The municipality is simply providing the service of appropriating, diverting, and delivering the public's property. K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 381 A.2d 774, 782 (N.J. 1977). Under this characterization, the predominant factor in the transaction is the provision of services. *Id.* Under the predominant factor test, the U.C.C. does not govern this transaction. *See* Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (stating that if contract is primarily for services, U.C.C. does not govern its terms).

[120] *See, e.g., Zepp*, 348 S.E.2d at 677-78 (reasoning that water is analogous to electricity and adopting rationale of *Helvey* decision); *Mulberry-Fairplains*, 412 S.E.2d at 915 (relying on *Zepp* court's determination that water is a good); *Gall*, 555 A.2d at 789 (holding that, under *Helvey* test, water is a good).

[121] *See infra* notes 149-54 and accompanying text (discussing dilemma courts face if they hold that water is a good).

[122] *See Bonebrake*, 499 F.2d at 960 (noting that test for application of U.C.C. in case involving goods and services is predominant factor test).

[123] *K.S.B.*, 381 A.2d at 780; *see also* Twin Falls Land & Water Co. v. Twin Falls Canal Co., 7 F. Supp. 238, 245 (D. Idaho 1933) (noting that water is life-blood of western states), *aff'd*, 79 F.2d 431 (9th Cir. 1935).

[124] *See* McCarter v. Hudson County Water Co., 65 A. 489, 492 (N.J. 1906) (reasoning that state, on behalf of its citizens, has control over its waters), *aff'd*, 209 U.S. 349 (1908). At English common law, navigable waters belonged to the King for the use of all. 2 WILLIAM BLACKSTONE, COMMENTARIES *14; EMMERICH DE VATTEL, THE LAWS OF NATIONS, bk. I, ch. 20 (Philadelphia, T. & J.W. Johnson & Co. 1859). This led to the public trust doctrine. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 51 (N.J. 1972) (stating that public trust doctrine originates from English principle that sovereign holds tidal lands for use by public). Under this doctrine, the state holds unappropriated water in trust for the public. *See* Ivanhoe Irrigation Dist. v. All Parties & Persons, 306 P.2d 824, 837 (Cal. 1957) (noting that state holds appropriated water in trust for users), *rev'd*

Prior to appropriation, a state's water belongs to the people.[125] Some case law goes so far as to indicate that appropriation by a municipality does not transfer ownership of the water to the municipal corporation.[126] Therefore, municipalities are primarily providing the service of water delivery to the public.[127]

The Supreme Court of New Jersey has issued two decisions examining the nature of the services that municipal water companies provide.[128] In both instances, the court reasoned that the municipality's primary function is to appropriate and deliver water to the public.[129] In *In re Town of West New York*,[130] the New Jersey Supreme Court directly addressed whether a municipality that delivers water provides a service.[131]

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sub nom. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958); *K.S.B.*, 381 A.2d at 780-81 (noting that water is common property). The doctrine provides a foundation for contemporary laws regarding ownership of water. *See Neptune City*, 294 A.2d at 51 (tracing development from public trust doctrine to current law); BLACKSTONE, *supra*, at *14 (noting that public has common ownership of water); VATTEL, *supra*, ch. 20 (stating that public owns rivers).

Lawmakers have incorporated the public trust doctrine into state law through codification and judicial decisions. *See, e.g.*, CAL. WATER CODE § 102 (Deering 1977) (providing that water within state is property of people of state); N.H. REV. STAT. ANN. § 270:60 (1995) (stating that water is resource which state holds in trust for public benefit); N.D. CENT. CODE § 61-01-01 (1995) (declaring that all water in state belongs to public); OR. REV. STAT. § 537.110 (1995) (establishing that all water within state belongs to public); TENN. CODE ANN. § 61-221-702 (1995) (recognizing that state holds water in trust for public and public has right to drinking water); TEX. WATER CODE ANN. § 15.326 (1988) (noting that state holds water in trust for benefit of public); Maryland v. Amerada Hess Corp., 350 F. Supp. 1060, 1066 (D. Md. 1972) (noting that state owns navigable waters as "quasi trustee" for public benefit); *Twin Falls Land & Water*, 7 F. Supp. at 245 (noting that water is administered as public trust); *Ivanhoe*, 306 P.2d at 841 (holding that citizens of state hold title to unappropriated water); *K.S.B.*, 381 A.2d at 782 (holding that municipal systems deliver water which is subject to public ownership); *Neptune City*, 294 A.2d at 47 (noting that state holds title to water in trust for people of state).

[125] *See supra* note 124 (discussing public trust doctrine).

[126] *See, e.g., In re* Town of West New York, 136 A.2d 654, 658-59 (N.J. 1957) (accepting water company's argument that it does not own water that it delivers to public).

[127] *See K.S.B.*, 381 A.2d at 782 (citing with approval cases holding that utilities sell services).

[128] *Id.* at 774; *Town of West New York*, 136 A.2d at 654.

[129] See *K.S.B.*, 381 A.2d at 782 (reasoning that waterworks system appropriates and delivers common water to public); *Town of West New York*, 136 A.2d at 658-59 (accepting water company's argument that it merely diverts and supplies water).

[130] 136 A.2d 654 (N.J. 1957).

[131] *See id.* at 658 (addressing whether water is raw material, fuel, or a good for purposes of New Jersey personal property tax). The court in *In re Town of West New York* discussed

The court accepted the water company's argument that it did not own the water it delivered;[132] rather, the company merely diverted and supplied water that the state held in trust for the public.[133] Therefore, the court held that the municipality was charging customers for the service of delivering water.[134]

In the second case, *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission*,[135] the New Jersey Supreme Court examined the dichotomy between sales and service in a case involving the General Agreement on Tariffs and Trade (GATT).[136] The court held that GATT does not apply to the

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whether an ad valorem personal property tax assessment against Hackensack Water Co. was proper. *Id.* at 656. The court determined that water in the mains of a water company is not the company's taxable personal property. *Id.* at 658. Therefore, the company's delivery of water is a service rather than a sale of municipal property. *Id.* at 658-59.

[132] *See id.* at 659. The water company argued that it possessed the water in trust for the people. *Id.* at 657. Thus, the company had the right to use the water to supply the public, but did not own it. *Id.* In support of its argument, the water company noted that the value of the water was not the basis for the customers' bills. *Id.* at 658. Instead, the water company based its charges upon the value of its distribution system. *Id.* Furthermore, experts testified that they could not value water flowing through a utility's water mains. *Id.* Finally, the court noted that the water company did not carry water as an asset on its books. *Id.*

[133] *See id.*

[134] *See id.* at 656.

[135] 381 A.2d 774 (N.J. 1977). In *K.S.B.*, the court considered the constitutionality of a "buy American" provision in bidding requirements for a water treatment plant. *Id.* at 777. If the "buy American" clause violated GATT, the clause was void under the Supremacy Clause. *Id.* The plaintiff argued that the provision violated GATT's requirement that states not discriminate against imported goods. *Id.* at 778 (citing GATT, Oct. 30, 1947, pt. II, art. III, ¶ 4, 62 Stat. 3680, 55 U.N.T.S. 188). The state argued that GATT did not apply because the contract did not involve goods. *Id.*

[136] *K.S.B.*, 381 A.2d at 782. Courts have looked to GATT cases for authority that a commodity is a "good" under the U.C.C. A California Court of Appeal relied upon a finding that electricity is a good under GATT in holding that the U.C.C. governs sales of electricity. *See* Pierce v. Pacific Gas & Elec. Co., 212 Cal. Rptr. 283, 290, 293-94 (Ct. App. 1985) (relying on GATT case for proposition that electricity is a good to analyze nature of electricity in non-GATT case). The *Pierce* court discussed whether implied warranties attach to the sale of electricity in a personal injury action. *Id.* at 286. It first held that electricity is a product, *id.* at 290-91, basing its finding in part on the 1962 GATT case of *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 25 Cal. Rptr. 798 (Ct. App. 1962). *Id.* at 290. The *Baldwin* court had held that electricity is a good under GATT because it can be manufactured, transported, and sold. *Baldwin*, 25 Cal. Rptr. at 809.

In determining that electricity is a good under the U.C.C., the *Pierce* court again referred to the *Baldwin* court's determination that electricity is a commodity. *Pierce*, 212 Cal. Rptr. at 293 n.12. The *Pierce* court indicated that for the same reasons that electricity is a product, electricity is also a good. *Id.* Therefore any U.C.C. implied warranties attach to its sale. *Id.* This analysis, however, is dictum because the *Pierce* court held that the plaintiff

sale of water.[137] Considering whether a municipal water company is selling goods, the court noted that water is a product of nature which the public owns.[138] The water company merely appropriates and distributes the public's property.[139] Therefore, the consumer is purchasing a distribution service rather than the water itself.[140]

Because these New Jersey cases did not involve disputes over sales of goods, Article 2 of the U.C.C. did not apply.[141] However, the courts' reasoning indicates that delivering water is primarily a service, not the sale of a commodity.[142] Courts have not addressed the dichotomy between sales and service in determining whether the U.C.C. applies to municipal water sales.[143] However, the New Jersey Supreme Court's characterization of municipal water sales would support a holding that the U.C.C. does not govern these transactions.[144]

When a transaction involves both goods and services, courts should apply the *Bonebrake* test to determine whether the U.C.C. governs the transaction.[145] In applying this test to municipal water sales, courts should consider the unique nature of the product involved.[146] In delivering water to the public, municipalities are distributing water that the state holds in trust for the

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had improperly pleaded the implied warranties cause of action. *Id.* at 293.

[137] *K.S.B.*, 381 A.2d at 778.

[138] *See id.* at 780-81.

[139] *See id.* at 780. The *K.S.B.* court discussed cases from New Jersey and Arizona indicating that the provision of water is a service, not a sale. *Id.* at 780-81.

[140] *See id.* at 782 (noting that furnishing water may be service rather than sale). In discussing whether the distribution of water is a service, the *K.S.B.* court cited *Re 77 Consumers of Acme Water Co.*, 24 Pub. Util. Rep. (PUR) 63, 64 (1938). The *K.S.B.* court stated: "'A [water] public utility is selling a service. Water is God's gift to man. It is free. The utility is selling a service for the distribution of water and not water as a commodity.'" *Id.* at 782 (quoting *Acme*, 24 Pub. Util. Rep. (PUR) at 64) (alteration in original).

[141] *See* U.C.C. § 2-102 (1989) (limiting application of Article 2 to transactions in goods).

[142] *See K.S.B.*, 381 A.2d at 782 (noting that contract for supply of water could be predominantly for services); *In re* Town of West New York, 136 A.2d 654, 658-59 (N.J. 1957) (discussing reasons why municipal delivery of water is service and not sale).

[143] *See supra* notes 44-49 and accompanying text (noting that courts have not applied predominant factor test in determining whether municipal water sales are sales of goods).

[144] *See supra* notes 128-40 and accompanying text (noting that New Jersey Supreme Court treats municipal water delivery as service).

[145] *See* Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974) (reasoning that, when contract includes both goods and services, courts should apply predominant factor test).

[146] *See K.S.B.*, 381 A.2d at 782 (considering nature of water in discussion of whether municipal sales of water are sales of goods).

public.[147] The predominant factor in the transaction is the appropriation and delivery of water, not the sale of water.[148] Therefore, under the *Bonebrake* predominant factor test, the U.C.C. does not govern municipal water sales.

B. Treating Municipal Sales of Water as a Service Furthers Public Policy

The majority of courts have held that municipal water sales are sales of goods,[149] thereby forcing courts to make difficult decisions. Despite the express requirements of the U.C.C.,[150] courts are reluctant to attach implied warranties to these sales.[151] In eliminating U.C.C. implied warranties, courts are subordinating their duty to apply the law as written[152] to the public policy against imposing strict liability on municipalities.[153] The courts' inconsistent application of the law contradicts the U.C.C.'s stated purpose of uniformity.[154]

Under the model solution, courts would not have to violate the plain meaning of the U.C.C. to comply with established public policy regarding municipal liability.[155] Instead, courts

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[147] *See supra* notes 123-27 and accompanying text (noting that, under public trust doctrine, public owns water that municipalities deliver).

[148] *See supra* notes 128-44 and accompanying text (discussing New Jersey Supreme Court holdings that municipalities provide services when delivering water).

[149] *See supra* notes 72-78 and accompanying text (discussing courts' application of U.C.C. to water sales when sales do not involve implied warranties).

[150] *See* U.C.C. § 2-314 (1989) (providing that implied warranty of merchantability attaches to contract unless parties expressly exclude or modify warranty).

[151] *See supra* notes 82-102 and accompanying text (describing methods courts use to avoid attaching implied warranties to municipal sales of water).

[152] *See, e.g.*, Hendershot v. Hendershot, 785 S.W.2d 34, 36 (Ark. Ct. App. 1990) (noting that if language in statute is unambiguous, court should apply statute as written); Safeway Stores, Inc. v. Superior Court, 235 Cal. Rptr. 636, 639 (Ct. App. 1987) (recognizing that courts must apply statutes as written); City of Littleton v. Fire & Police Pension Ass'n, 786 P.2d 458, 461 (Colo. Ct. App. 1989) (stating that court must apply plain meaning of statute).

[153] *See* Canavan v. City of Mechanicville, 128 N.E. 882, 884 (N.Y. 1920) (reasoning that municipalities should not be insurers of water); Coast Laundry, Inc. v. Lincoln City, 497 P.2d 1224, 1228 (Or. Ct. App. 1972) (noting that municipalities do not guarantee water quality); Gall v. Allegheny County Health Dep't, 510 A.2d 926, 928 (Pa. Commw. Ct. 1986) (relying on legislative policy of granting immunity to municipalities), *aff'd in part and rev'd in part*, 555 A.2d 786 (Pa. 1989).

[154] *See* U.C.C. § 1-102 (stating that purpose of U.C.C. is to clarify law and to make state laws uniform).

[155] *See supra* notes 145-48 and accompanying text (arguing that U.C.C. does not apply to

would apply the *Bonebrake* test and find that municipalities are predominantly providing a service when selling water.[156] Under this analysis, the U.C.C. does not govern these sales, and courts need not attach the U.C.C.'s problematic implied warranties to municipal water sales.[157]

Proponents of attaching implied warranties to municipal water sales may attack this solution on three major grounds. First, critics may argue that this solution defeats the U.C.C.'s goal of uniformity.[158] The U.C.C. governs analogous sales by utilities, and likewise should govern water sales.

Courts have pointed to the goal of uniformity when holding that natural gas and electricity are goods.[159] However, the policy of uniformity does not require a finding that municipal water sales are transactions in goods. Water is fundamentally different from natural gas and electricity because it belongs to the public prior to appropriation.[160] Therefore, unlike the distribution of gas and electricity,[161] the distribution of water does not involve a sale of goods.[162]

Additionally, characterizing municipal water sales as sales of goods has led to inconsistent results, thereby undermining uniformity.[163] Because courts are unwilling to imply warranties for

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municipal water sales; thus implied warranties do not attach).

[156] *See supra* notes 123-44 and accompanying text (arguing that municipalities provide service when delivering water).

[157] *See supra* notes 11-13 and accompanying text (noting that at common law, municipality is liable for injuries caused by contaminated water only if it was negligent).

[158] U.C.C. § 1-102(2)(c). The U.C.C. states that its provisions, including the definition of goods, should be "liberally construed." *Id.* § 1-102(1).

[159] *See* Helvey v. Wabash County REMC, 278 N.E.2d 608, 610 (Ind. Ct. App. 1972) (noting that natural gas is a good and reasoning that U.C.C. policy of uniformity supports finding that electricity is a good); Gardiner v. Philadelphia Gas Works, 197 A.2d 612, 613 (Pa. 1964) (holding that U.C.C. governs contract for sale of natural gas because legislature adopted U.C.C. to promote uniformity).

[160] *See supra* notes 123-27 and accompanying text (noting that, under public trust doctrine, water belongs to public).

[161] *See, e.g., Helvey*, 278 N.E.2d at 610; Cincinnati Gas & Elec. Co. v. Goebel, 28 Ohio Misc. 2d 4, 5 (Hamilton County Mun. Ct. 1986) (holding that electricity is a good after it passes through the buyer's meter); *Gardiner*, 197 A.2d at 613-14 (holding that utility's distribution of gas was sale of goods under U.C.C.).

[162] *See supra* notes 128-44 and accompanying text (arguing that municipal water systems provide services of appropriation and distribution).

[163] *See supra* notes 79-102 and accompanying text (discussing inconsistent application of U.C.C. to claims for breach of implied warranty).

municipal water sales, they have applied the law erratically to avoid the unwanted result.[164] Thus, the model solution would actually further the U.C.C.'s policy of uniformity by eliminating the courts' inconsistent application of the law.

Second, critics may argue that the problem with the current regime is its leniency, not its stringency. As courts are bound to apply the law as written,[165] critics may contend that courts err in not attaching implied warranties to municipal water sales. Further, they may assert that implied warranties are necessary to ensure that municipalities exercise sufficient care in maintaining water quality.

The model solution continues the standard for liability that has protected municipal waterworks systems for over a century.[166] Under the model solution, municipalities are still subject to liability for their negligence. The model solution merely provides courts with a reasoned basis for freeing municipalities from strict liability.

Finally, critics may argue that individuals who consume contaminated water should not bear the resulting costs. This argument presumes that municipalities are better able to bear such costs. While this argument is meritorious, the model solution would permit courts to allocate costs in accordance with fairness.[167] Under the model solution, common law rules govern municipal water sales.[168] However, common law does

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[164] *See, e.g.*, Sternberg v. New York Water Serv. Corp., 548 N.Y.S.2d 247, 248 (App. Div. 1989) (relying on cases under U.S.A. and holding that implied warranties do not attach to municipal water sales); Coast Laundry, Inc. v. Lincoln City, 497 P.2d 1224, 1228 (Or. Ct. App. 1972) (holding that implied warranties do not attach to municipal sales of water); Gall v. Allegheny County Health Dep't, 555 A.2d 786, 788-89 (Pa. 1989) (holding that although implied warranties attach to municipal sales of water, plaintiff may sue municipality only for negligence).

[165] *See* cases cited *supra* note 152.

[166] *See supra* note 11 and accompanying text (discussing early cases establishing negligence standard of liability to protect water consumers).

[167] *See infra* note 169 and accompanying text (noting that courts can impose U.C.C. implied warranties by analogy).

[168] *See supra* notes 145-48 and accompanying text (arguing that, under predominant factor test, U.C.C. does not govern municipal sales of water). Under common law, municipalities are subject to liability for negligence. *See* Canavan v. City of Mechanicville, 128 N.E. 882, 883 (N.Y. 1920) (noting that municipalities have duty of reasonable care in providing wholesome water); *Sternberg*, 548 N.Y.S.2d at 248 (reinstating negligence cause of action and dismissing claims for breach of implied warranties); *Coast Laundry*, 497 P.2d at 1228 (holding that municipality is liable for impurities in water if it was negligent).

not prevent courts from applying the U.C.C. by analogy.[169] Many courts, upon finding that the defendant provided a service, have held by analogy that implied warranties attach to that service.[170]

Thus, under the model solution, courts have the flexibility to allocate costs in light of the facts presented to them. They may impose strict liability or hinge liability on negligence, depending on the particular situation. This freedom is preferable to imposing liability on public entities regardless of the surrounding circumstances, as a strict application of the U.C.C. would require.

CONCLUSION

In determining that municipal sales of water are sales of goods, courts have applied only one of the two applicable tests. Water meets the requirements of U.C.C. section 2-105 in that it is simultaneously existing and movable.[171] However, courts should also determine whether the contract in question is predominantly for the sale of goods.[172] Courts in water cases have failed to apply this second test.

Rather than treating the delivery of water as a sale of goods, courts should treat water sales by municipalities as the provision

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[169] *See* United States v. Consolidated Edison Co., 590 F. Supp. 266, 269 (S.D.N.Y. 1984) (noting that courts have applied U.C.C. to contracts for services and applying U.C.C. provisions to non-U.C.C. transaction).

[170] *See, e.g.*, Everett Plywood & Door Corp. v. United States, 419 F.2d 425, 429 (Ct. Cl. 1969) (holding that, even though contract was not for goods, plaintiff may still pursue claim for breach of U.C.C. implied warranties); Kulhanjian v. Detroit Edison Co., 251 N.W.2d 580, 584 (Mich. Ct. App. 1977) (determining that implied warranties attach to service of delivering electricity); Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 196 N.W.2d 316, 317 (Mich. Ct. App. 1972) (noting that implied warranties may attach to sales of services); Hoffman v. Misericordia Hosp., 267 A.2d 867, 870 (Pa. 1970) (holding that implied warranties attach to service of selling blood).

[171] *See supra* notes 72-78 and accompanying text (discussing courts' application of *Helvey* test to sales of water).

[172] *See supra* notes 67-68 and accompanying text (discussing courts' failure to apply *Bonebrake* test to water sales).

of services.[173] Under the public trust doctrine, the people of the state own the water prior to appropriation.[174] Therefore, the utility is delivering to the people that which they already own.

This model solution provides courts with flexibility in cases alleging a breach of implied warranties.[175] Because courts hesitate to hold municipalities strictly liable, they have searched for reasons to exclude or limit U.C.C. implied warranties.[176] If municipal sales of water are service contracts, the U.C.C. does not govern the transactions, and courts are not required to apply U.C.C. implied warranties.[177] Courts may then set the standards for municipal liability in light of local policies regarding governmental accountability and the equities of the case at hand.

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[173] *See supra* notes 120-48 and accompanying text (proposing model solution).

[174] *See supra* notes 123-27 and accompanying text (stating that, prior to appropriation, people of state own water).

[175] *See supra* note 169 and accompanying text (noting that under common law, courts may imply U.C.C. warranties by analogy).

[176] *See supra* notes 79-102 and accompanying text (noting courts' limitations on implied warranties).

[177] *See supra* notes 145-57 and accompanying text (discussing implications of model solution).