ANIMALS

SANDERS v. BARTON, 670 So. 2d 880 *(Ala. 1995)*: The purchasers entered into a contract with H.B. Sanders and his son, Jerry Sanders, d/b/a Wiregrass Farms (hereinafter "the sellers") for the purchase of 10 emu chicks. ... The purchasers sued the sellers, for failure to deliver 9 of the emu chicks. The trial court erred in holding that the contract for the sale of the emu birds was not governed by the UCC. The authority cited by the trial court, Loeb & Co., stands for the proposition that a farmer, solely by reason of occupation, does not come within the definition of a "merchant" in *Ala. Code 1975, § 7-2-104*. The trial court apparently determined, mistakenly, that the transaction was not between merchants and that the UCC therefore did not apply to it.

The purchasers concede this point, but contend that, nevertheless, the contract is not governed by the UCC because, they argue, in adopting the UCC the legislature did not intend that emu birds come within the UCC definition of "goods." We disagree with this argument. *Ala. Code 1975, § 7-2-105(1)*, defines "goods" as: "All things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 7-2-107)." This broad definition includes the emu chicks that were the subject of the contract at issue.

MODULAR HOME

LITTLE v. GRIZZLY MFG. *636 P.2d 839 (Mont. 1981*); Purchasers brought action to recover damages for alleged negligence, breach of contract and breach of general warranties arising from the sale of a modular home by Grizzly Mfg. to the Littles. Sellers argued that the Uniform Commercial Code applied to the transaction and precluded the use of the general statutory warranties. The court agree. Article 2 of the Uniform Commercial Code applies to sales of "goods". "Goods" is defined in *section 30-2-105, MCA*, as follows: ... The court noted that the question of whether a sale of a modular home is governed by the U.C.C. has been decided by only two courts. The Indiana Court of Appeals held that the sale of a modular home was a sale of "goods" and therefore governed by the U.C.C. *Stephenson v. Frazier (Ind.Ct.App., 1980), 399 N.E.2d 794.* In *Cates v. Morgan Portable Building Corp., (7th Cir. 1979), 591 F.2d 17,* the court approved of the lower court's conclusion that two prefabricated modular hotel units were "goods" under U.C.C. § 2-105.

The respondents have argued that Grizzly Manufacturing had charge of the home until after it was permanently affixed to the foundation, at which point it no longer had mobility. However, the time of identification to the contract is not dependent upon control of the goods by either

party or upon delivery. According to Anderson, Uniform Commercial Code § 2-501:4: "In the case of the manufacture of goods to the buyer's specifications, the fact that the goods are to the buyer's specifications is a sufficient identification of the goods to the contract. Consequently there is an identification of the goods from the moment when the first step of production is made with the raw materials which are intended to be finally worked into the goods required by the buyer's contract." The evidence shows that the modular home was manufactured to the Littles' specifications with regard to design and decoration. Thus the time of identification to the contract was the time of the first step in production. At that time the modular home was movable. The Uniform Commercial Code therefore governs this case and the general statutory warranties of sections 30-11-201 et seq., MCA are inapplicable by virtue of *section 30-11-224, MCA*.

ELECTRICITY

NEW BALANCE ATHLETIC SHOE, INC. v. BOSTON EDISON CO., *1996 Mass. Super. LEXIS 496*: In August 1994, a facility in Boston owned by New Balance was severely damaged by fire. New Balance alleged that the cause of the fire was an electrical power surge caused by equipment operated by Boston Edison and brought claims for negligence and breach of warranty under the UCC (Count II). The critical question raised was whether electricity is a "good" as defined in the UCC. If electricity was found not to be a "good" as defined by the UCC the warranties in the UCC would not apply and Count II must fail as a matter of law. The issue was one of first impression in the state. Other jurisdictions that have adopted the UCC have wrestled with this issue. For example, Indiana has subjected public utility companies to liability for producing electricity by holding that the sale of electricity does involve the sale of a "good" under the UCC. See *Helvey v. Wabash County REMC, 151 Ind. App. 176, 278 N.E.2d 608 (1972).* Indiana has limited this holding to cases where the electricity has passed the customer's electric meter. See *Petroski v. Northern Indiana Pub. Serv. Co., 171 Ind. App. 14, 354 N.E.2d 736 (1976).*Indiana supports this conclusion by finding that electricity is a thing existing and moveable. The court in *Helvey*, applying the definition of a "good" under the Uniform Commercial Code, said "logic would indicate that whatever can be measured in order to establish the price to be paid would be indicative of fulfilling both the existing and moveable requirements of goods." *Helvey, 151 Ind. App. 176, 178, 278 N.E.2d 608, 610 (1972).*

The Massachusetts court, however, was troubled by the sweeping implications that this analysis may have on public utilities. "One can foresee a logical extension from electric companies to providers of natural gas and water. Courts in Georgia and Pennsylvania have made this extension. See *Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964)* (applying breach of warranty analysis to case involving provider of natural gas). This application of the Uniform Commercial Code has also implicated municipalities who provide water. See *Gall v. Allegheny Health Dept., 521 Pa. 68, 555 A.2d 786 (1989)* (applying breach of warranty analysis to water supplier); *Zepp v. Mayor & Council of Athens, 180 Ga. App. 72, 348 S.E.2d 673 (1986)* (holding that water is a "good" as defined in the Uniform Commercial Code)."

Boston Edison asserted that public utilities are so heavily regulated that this fact should place them outside the traditional scope of tort and contract law, at least under the circumstances of this case. The court stated that product liability law is rooted in public policy considerations that may not be as important when the defendant is a public utility company. Public utilities in many respects cannot be compared to companies competing on the open market to sell a product. Public utilities are subject to stringent regulations. Regulators control entry into the business of providing a public utility. Utility companies undertake a public duty to provide service. Moreover, a public utility has to comply with a closely regulated rate or price schedule. Thus, public utilities do not slip easily into the category of companies that require the imposition of product liability to adequately protect the consumer. Accordingly, the court found that electricity is not a "good" as defined in the UCC and therefore no basis to apply the warranty provisions of the UCC. See also Pierce v. PG&E 212 Cal. Rptr. 283 (Cal. App. 1985) (electricity is a "product" for strict liability in tort, suggesting that electricity would also be goods under UCC).

WATER

MATTOON vs. CITY OF PITTSFIELD, 775 N.E.2d 770 (Mass. App.2002): The plaintiffs brought a class action complaint claiming that they had contracted giardiasis (an illness caused by giardia, a parasite found in the intestines of certain animals) as a result of contamination of the public water supply of Pittsfield in 1985. The complaint included counts for breach of express warranty and breach of implied warranty. The plaintiffs' warranty claims were brought under Art. 2 of the UCC. As a threshold matter, the code's art. 2 warranty provisions are limited to transactions in "goods." See *UCC § 2-102*. "Goods" is a term defined in *UCC § 2-105(1)* as "all things . . . which are movable at the time of identification to the contract for sale." The plaintiffs argue that because water is a thing that is movable, its provision by a municipality is governed by art. 2 of the code. The city argues, however, that provision of water by a municipality is not a sale of goods but rather the rendering of a service and, therefore, the judge should have, as matter of law, dismissed the breach of warranty claims. There are no decisions in Massachusetts on this issue and decisions in other jurisdictions are divided.

In *Gall v. Allegheny County Health Dept., 555 A.2d 786 (Pa. 1989),* the court ruled that the sale of water by a municipality did constitute the sale of goods under the UCC. In accord is *Zepp v. Mayor & Council of Athens, 348 S.E.2d 673 (1986).*However, in *Coast Laundry, Inc. v. Lincoln City, 497 P.2d 1224 (1972),* the court held that sale of water by a municipality to a customer-laundry was not a sale of goods within the scope of art. 2 of the UCC. In *Canavan v. Mechanicville, 128 N.E. 882 (1920),* the court held that the furnishing of water by a municipal corporation to consumers is a sale of goods, but the court also held that a negligence standard should apply because a municipality cannot be expected to eliminate all water contaminants. Canavan was a pre-code decision. However, in *Sternberg v. New York Water Serv. Corp., 548 N.Y.S.2d 247 (N.Y. App. Div. 1989),* the court relied on *Canavan* and ruled that although municipal sale of water is a sale of goods, warranties do not apply.

In contrast to the sale of goods, the rendition of services is not covered by art. 2 of the code. Where a contract is for both sales and services as here, in order to determine whether art. 2 is applicable, the test is whether "the predominant factor, thrust, or purpose of the contract is . . . 'the rendition of service, with goods incidentally involved.'" Ibid., quoting from*Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974).*

Water is a unique product and is essential to human health and well-being. Here, the city did not create or manufacture the water. Rather, the city, by a system of reservoirs, captured the water from brooks, streams, and rainfall. It treated the water and then distributed it to its citizens. Although the city charged a sum for the water, that rate reflected the cost of storage, treatment and distribution. Thus, it is clear that the predominant factor, thrust, or purpose of the activity was the rendition of services and not the sale of goods. Sound public policy helps dictate our result. The watershed feeding the city's reservoirs consisted of approximately 6,000 acres, much of which was accessible to the public. As such, the water supplied by the city cannot practically be protected against all potential contamination from humans and animals. See *Canavan v. Mechanicville, 128 N.E. 882 (1920).* The cost to protect the water in the reservoirs would be prohibitive. Therefore, we hold that the code did not cover in this instance the city's provision of water to its citizens and the judge properly dismissed the claims for breach of warranty. We express no opinion whether commercial vendors of bottled water would be subject to warranty claims under art. 2 of the UCC.