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Casenotes: Uniform Commercial Code —  
Implied Warranty Provisions of the Maryland  
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Consumer Goods Even When the Transaction Is  
Predominantly One for the Rendering of  
Consumer Services. *Anthony Pools v. Sheehan*, 295  
Md. 285, 455 A.2d 434 (1983)

Dennis J. Bodley  
*University of Baltimore School of Law*

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UNIFORM COMMERCIAL CODE — IMPLIED WARRANTY PROVISIONS OF THE MARYLAND UNIFORM COMMERCIAL CODE ARE APPLICABLE TO CONSUMER GOODS EVEN WHEN THE TRANSACTION IS PREDOMINANTLY ONE FOR THE RENDERING OF CONSUMER SERVICES. *Anthony Pools v. Sheehan*, 295 Md. 285, 455 A.2d 434 (1983).

A consumer<sup>1</sup> was injured when he slipped from a diving board and fell onto the edge of his swimming pool. The diving board and pool had been designed, manufactured, and installed by the contractor, Anthony Pools.<sup>2</sup> The consumer and his wife sued the contractor for damages based on theories of strict liability in tort<sup>3</sup> and breach of an implied warranty of merchantability.<sup>4</sup> The contractor allegedly breached the warranty because the skid resistant material on top of the diving board stopped approximately one inch short of each edge.<sup>5</sup> The Circuit Court for Montgomery County directed a verdict in favor of the contractor based on warranty limitations contained in the contract of sale.<sup>6</sup> On appeal, the Court of Special Appeals of Maryland reversed, holding that the swimming pool package constituted consumer goods under section 9-109 of the Maryland Uniform Commercial Code (Maryland U.C.C.).<sup>7</sup> Therefore, since section 2-316.1 of the Maryland U.C.C. prohibits the modification or exclusion of implied warranties in the sale of consumer goods,<sup>8</sup> the contractor's attempt to do so was ineffective.<sup>9</sup> In affirming this decision, the Court of Appeals of Maryland held that when consumer goods, sold as part of a sales-service transaction, retain their character as consumer goods after the transaction is

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1. Plaintiff is characterized as a "consumer" since the allegedly defective diving board, which is the basis of the plaintiff's cause of action, is a consumer good as defined in U.C.C. § 9-109(1) (1978).
  2. *Anthony Pools v. Sheehan*, 295 Md. 285, 286-87, 455 A.2d 434, 435 (1983).
  3. *Id.* That portion of the court of special appeals' opinion that dealt with the strict liability issue is beyond the scope of this casenote. The issue is noteworthy, though, because that court held that the trial court erred in failing to instruct the jury that a consumer's contributory negligence is not a defense in a strict liability cause of action. *Sheehan v. Anthony Pools*, 50 Md. App. 614, 626, 440 A.2d 1085, 1092 (1982), *aff'd*, 295 Md. 285, 299, 455 A.2d 434, 441 (1983) (adopting the court of special appeals' discussion of the issue).
  4. *Anthony Pools v. Sheehan*, 295 Md. 285, 287, 455 A.2d 434, 435-36 (1983). An implied warranty of merchantability attaches to goods sold by a merchant of goods of that kind. MD. COM. LAW CODE ANN. § 2-314 (1975).
  5. *Anthony Pools v. Sheehan*, 295 Md. 285, 287, 455 A.2d 434, 435-36 (1983).
  6. *Id.* at 287, 455 A.2d at 436. The contractor excluded all warranties, express and implied, that were not contained in the written contract.
  7. "Goods are (1) 'consumer goods' if they are used or bought for use primarily for personal, family, or household purposes . . ." MD. COM. LAW CODE ANN. § 9-109(1) (1975).
  8. "Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable." *Id.* § 2-316.1.
  9. *Sheehan v. Anthony Pools*, 50 Md. App. 614, 619-20, 440 A.2d 1085, 1088-89 (1982), *aff'd*, 295 Md. 285, 455 A.2d 434 (1983).

completed, the implied warranty provisions of the Maryland U.C.C.<sup>10</sup> apply, even when the transaction is predominantly one for the rendering of consumer services.<sup>11</sup>

Contracts like the one in issue in *Anthony Pools v. Sheehan*,<sup>12</sup> involving both the sale of goods and the rendering of services, are common.<sup>13</sup> Generally, courts faced with this type of contract initially determine whether it is a contract for goods or services. If the court determines that the contract is a transaction in goods, it is governed by article two of the U.C.C.<sup>14</sup> If the court finds that the contract is for services, however, article two is inapplicable. Because this determination will conclude such important matters as whether a warranty will be implied,<sup>15</sup> or which statute of limitations will govern,<sup>16</sup> the outcome of the litigation may depend on the characterization of the contract. While there is little doubt that a court will apply article two to a pure sale of goods situation and deny its application in a pure service context, between these two extremes lies the hybrid transaction featuring characteristics of both sale and service. Most courts apply the essence or predominant purpose test in determining whether a contract is one for the sale of goods or one for the rendition of services.<sup>17</sup>

In 1974, the United States Court of Appeals for the Eighth Circuit in *Bonebrake v. Cox*<sup>18</sup> applied the predominant purpose test to a contract for the sale and installation of bowling lanes and related equipment. In holding that the contract was governed by article two of the U.C.C., the court stated that the test for determining whether a transaction is one for goods or services is whether the transaction's predomi-

10. MD. COM. LAW CODE ANN. § 2-314 (1975).

11. *Anthony Pools v. Sheehan*, 295 Md. 285, 298, 455 A.2d 434, 441 (1983).

12. 295 Md. 285, 455 A.2d 434 (1983).

13. Note, *Contracts for Goods and Services and Article 2 of the Uniform Commercial Code*, 9 RUT.-CAM. L.J. 303 (1978).

14. Article two "applies to transactions in goods." U.C.C. § 2-102 (1983). "Goods" are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale." *Id.* § 2-105(1).

15. Article two of the U.C.C. provides for three types of implied warranties: merchantability, *id.* § 2-314; fitness for a particular purpose, *id.* § 2-315; and, good title, *id.* § 2-312.

16. An action based on the U.C.C. must be commenced within four years after the cause of action has accrued. *Id.* § 2-725(1).

17. *LeSueur Creamery, Inc. v. Haskon, Inc.*, 660 F.2d 342 (8th Cir. 1981); *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976); *Ranger Constr. Co. v. Dixie Floor Co.*, 433 F. Supp. 442 (D.S.C. 1977); *Dynamics Corp. of Am. v. International Harvester Co.*, 429 F. Supp. 341 (S.D.N.Y. 1977); *Gulash v. Stylarama, Inc.*, 33 Conn. Supp. 108, 364 A.2d 1221 (1975); *Riffe v. Black*, 548 S.W.2d 175 (Ky. Ct. App. 1977); *Burton v. Artery Co.*, 279 Md. 94, 367 A.2d 935 (1977); *Meyers v. Henderson Constr. Co.*, 147 N.J. Super. 77, 370 A.2d 547 (1977); *Milau Assocs., Inc. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 368 N.E.2d 1247 (1977); *Allied Indus. Serv. Corp. v. Kastle Iron & Metals, Inc.*, 62 Ohio App. 2d 144, 405 N.E.2d 307 (1977); *Farnsworth, Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 652, 664 (1957).

18. 499 F.2d 951 (8th Cir. 1974).

nant purpose is for the rendition of services or for the sale of goods.<sup>19</sup>

Unlike the above jurisdictions,<sup>20</sup> at least one state has taken a significantly different approach in determining whether to apply the U.C.C. implied warranty provisions in a sales-service transaction. The Supreme Court of New Jersey, in *Newmark v. Gimbel's, Inc.*,<sup>21</sup> decided that this determination should be based on policy considerations underlying the theory of implied warranty such as consumer reliance<sup>22</sup> and the marketing responsibility of the seller.<sup>23</sup> In *Newmark*, a beauty salon patron brought suit based on breach of an implied warranty when her hair and scalp were injured, allegedly by a defective permanent wave lotion administered by the operator of the salon.<sup>24</sup> The *Newmark* court found that whether an implied warranty arises should not depend on the artificial distinction between a sale and a service.<sup>25</sup> Instead, the court stated this determination should be based on the policy reasons for imposing warranty liability in the case of an ordinary sale.<sup>26</sup> For example, a beauty salon operator holds himself out as possessing the knowledge to give a permanent wave and, consequently, the patron relies upon the operator's expertise in the selection as well as the application of the products used in the treatment.<sup>27</sup> Moreover, the *Newmark* court noted that the salon operator, having the status of a retailer, was part of the entire marketing venture that should bear the cost of injuries resulting from the sale of defective products.<sup>28</sup>

In Maryland, *Burton v. Artery Co.*,<sup>29</sup> was the first case in which the court of appeals had to determine whether a hybrid contract was one for the sale of goods or the rendering of services. In this 1977 decision

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19. *Id.* at 960. After stating this test, the court summarily concluded that the contract at issue was clearly one for goods as defined by the U.C.C. *Id.*

20. *See supra* note 17.

21. 54 N.J. 585, 258 A.2d 697 (1969).

22. *Id.* at 593-94, 258 A.2d at 701-02. For a more detailed discussion of consumer reliance as a basis for implied warranties, see Signal, *Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services*, 12 NEW ENG. L. REV. 859, 878-85 (1977).

23. *Newmark*, 54 N.J. at 600-01, 258 A.2d at 704-05; *see also* Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 Sw. L.J. 575, 580-81 (1974) (discussing marketing responsibility as a reason for implying warranties). Other policy reasons for implying warranties include the seller's being in a better position to bear any loss caused by defective products, his ability to redistribute the loss to his customers, and the seller's superior knowledge that gives him the opportunity to discover any defects in the products. Greenfield, *Consumer Protection in Service Transactions: Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661, 688-93.

24. *Newmark*, 54 N.J. at 598, 258 A.2d at 698-99.

25. *Id.* at 592, 258 A.2d at 700.

26. *Id.* at 593-94, 258 A.2d at 701-02.

27. *Id.* at 594, 258 A.2d at 701.

28. *Id.* at 600, 258 A.2d at 704-05.

29. 279 Md. 94, 367 A.2d 935 (1977); *see also* Schuchman v. Johns Hopkins Hosp., 9 U.C.C. REP. SERV. (CALLAGHAN) 637 (1971-1972) (under predominant purpose test, furnishing of blood for transfusions is a service, not a sale).

the court considered whether the four year statute of limitations under the Maryland U.C.C.<sup>30</sup> or the three year general limitations statute<sup>31</sup> applied to a contract for the furnishing and planting of a large amount of sod as well as several hundred trees and shrubs.<sup>32</sup> The court, adopting the predominant purpose test enunciated in *Bonebrake*, held that the substantial number of trees and shrubs indicated that the "predominant factor here, the thrust, the purpose, reasonably stated, is a transaction of sale with labor incidentally involved."<sup>33</sup> Hence, the four year statute under the Maryland U.C.C. was applicable.<sup>34</sup>

Six years later, however, in *Anthony Pools v. Sheehan*,<sup>35</sup> the court declined to apply the predominant purpose test in deciding whether implied warranties under the Maryland U.C.C. apply to consumer goods that are part of a sales-service transaction.<sup>36</sup> In attempting to determine whether the pool construction contract should be governed by article two of the Maryland U.C.C., the *Anthony Pools* court surveyed similar cases from other jurisdictions that used a predominant purpose test.<sup>37</sup> Despite this persuasive authority, the court rejected the predominant purpose test based on its interpretation of section 2-316.1 of the Maryland U.C.C.<sup>38</sup> Since this section provides that a seller cannot modify or exclude implied warranties as to "consumer goods . . . services or both,"<sup>39</sup> the court reasoned that the General Assembly intended consumer goods to be subject to the implied warranty provisions of the Maryland U.C.C. even though they are part of a contract for services.<sup>40</sup> Had the predominant purpose test been applied to the swimming pool transaction, the diving board would not have been covered by an implied warranty of merchantability since the contract was essentially one for services.<sup>41</sup> This result, the court concluded, "would

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30. MD. COM. LAW CODE ANN. § 2-725(1) (1975).

31. MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1980).

32. *Burton v. Artery Co.*, 279 Md. 94, 95-96, 367 A.2d 935, 935-36 (1977).

33. *Id.* at 114-15, 367 A.2d at 946; *accord Snyder v. Herbert Greenbaum & Assocs.*, 38 Md. App. 144, 380 A.2d 618 (1977) (contract to furnish and install carpet for 228 apartments was predominantly a sale of goods).

34. *Burton*, 279 Md. at 115, 367 A.2d at 946.

35. 295 Md. 285, 455 A.2d 434 (1983).

36. *Id.* at 297-98, 455 A.2d at 441.

37. *Id.* at 292, 455 A.2d at 438. The results reached in the cases surveyed by the court were not uniform. *Id.*; *see Gulash v. Stylarama, Inc.*, 33 Conn. Supp. 108, 364 A.2d 1221 (1975) (pool owners did not offer sufficient evidence on proper apportionment between labor and materials, and thus failed to establish the existence of an implied warranty under the U.C.C.); *Riffe v. Black*, 548 S.W.2d 175 (Ky. Ct. App. 1977) (installation of swimming pool is a transaction in goods); *Ben Constr. Co. v. Ventre*, 23 A.D.2d 44, 257 N.Y.S.2d 988 (1965) (pre-U.C.C. case involving swimming pool construction contract primarily for labor and services and not a transaction in goods under New York personal property law).

38. *Anthony Pools*, 295 Md. at 297-98, 455 A.2d at 440-41.

39. MD. COM. LAW CODE ANN. § 2-316.1 (1975).

40. *Anthony Pools*, 295 Md. at 297-98, 455 A.2d at 440-41.

41. *Id.*

be contrary to the legislative policy implicit in section 2-316.1."<sup>42</sup>

To effectuate legislative intent, the court in *Anthony Pools* adopted a "gravamen test."<sup>43</sup> Under this test, an implied warranty is imposed on the goods portion of a sales-service contract if the cause of action is based on an alleged defect in the goods. With respect to the swimming pool transaction, an implied warranty would therefore attach to the diving board because the cause of action was based on the allegation that the board was not merchantable.<sup>44</sup> The *Anthony Pools* court thus held that the implied warranty provisions of the Maryland U.C.C. would apply to consumer goods that retain their character as consumer goods after the performance promised to the consumer is completed, even if the transaction is predominantly one for the rendering of services.<sup>45</sup>

The court's decision that the diving board in *Anthony Pools* was subject to the implied warranty provisions of the Maryland U.C.C. is sound because policy considerations underlying the theory of implied warranty such as consumer reliance<sup>46</sup> and marketing responsibility of the seller<sup>47</sup> were clearly applicable in this case. The pool contractor was an expert in designing, manufacturing, and installing swimming pools and related equipment. As in *Newmark v. Gimbel's, Inc.*,<sup>48</sup> the consumer in *Anthony Pools* relied on the contractor's expertise to supply a safe pool and equipment.<sup>49</sup> Moreover, like the salon operator in *Gimbel's*, the contractor occupied the status of a retailer, and thus should be liable for injuries caused by the defective products it sold.<sup>50</sup> While the court in *Anthony Pools* may have considered these factors in reaching its decision,<sup>51</sup> it did not explicitly base its holding on a policy approach. It would seem, however, that while the court's gravamen test is preferable to the predominant purpose test in effectuating legislative intent, a policy approach enhances flexibility by allowing courts to consider various reasons for extending U.C.C. warranties to sales-service

42. *Id.* at 297-98, 455 A.2d at 441.

43. *Id.* at 298, 455 A.2d at 441. This test was proposed by Dean Hawkland in 1 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-102:04 (1982). Maryland is the first jurisdiction to adopt this test.

44. *Anthony Pools*, 295 Md. at 298, 455 A.2d at 441.

45. *Id.*

46. *See supra* note 23 and accompanying text.

47. *See supra* note 24 and accompanying text.

48. 54 N.J. 585, 258 A.2d 697 (1969).

49. *See supra* note 23.

50. *See supra* note 24.

51. The court of appeals stated:

A number of commentators have advocated a more policy-oriented approach to determining whether warranties of quality and fitness are implied with respect to goods sold as part of a hybrid transaction in which service predominates. [Citations omitted]. To support their position, these commentators in general emphasize loss shifting, risk distribution, consumer reliance, and difficulties in the proof of negligence.

*Anthony Pools*, 295 Md. at 294, 455 A.2d at 439.

contracts. A policy approach has the further advantage of being consistent with the U.C.C. requirement that its provisions be liberally construed.<sup>52</sup> Moreover, a policy approach, by abandoning the artificial sales-service distinction, serves one of the U.C.C.'s purposes, which is to modernize the law governing commercial transactions.<sup>53</sup>

The *Anthony Pools* court also left unresolved several issues concerning sales-service contracts. For example, it is unclear whether the broad language of section 2-316.1 of the Maryland U.C.C., which encompasses consumer services, would support a finding that an implied warranty attaches to pure service transactions.<sup>54</sup> The court also left unanswered whether consumer goods that do not retain their character as consumer goods after the sales-service transaction is completed, such as permanent wave lotions, will be subject to implied warranties under the Maryland U.C.C.<sup>55</sup> Since the court of appeals discussed the result in *Gimbel's* approvingly,<sup>56</sup> perhaps it will extend its holding to this type of "goods" as well. Finally, the court did not address the question of which test governs when sections of the Maryland U.C.C. other than section 2-316.1 are at issue. Thus, *Burton v. Artery Co.*,<sup>57</sup> in which the court used the predominant purpose test to determine whether the Maryland U.C.C.'s statute of limitations applied to a sales-service contract,<sup>58</sup> is apparently still viable precedent in Maryland.

The decision by the court of appeals in *Anthony Pools* to extend the implied warranty provisions of the Maryland U.C.C. to consumer goods, even though the goods are part of a transaction that is predominantly one for services, is supported by a statutory interpretation of section 2-316.1 and by the policy considerations underlying the theory of implied warranty. Unlike a true policy approach, however, the gravamen test adopted by the court is inflexible since it does not permit a court to consider the policy reasons for extending U.C.C. warranties that will differ from case to case.

*Dennis J. Bodley*

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52. Note, *supra* note 13, at 315; see U.C.C. § 1-102(1) (1983).

53. Note, *supra* note 13, at 316; see U.C.C. § 1-102 (2)(a) (1983).

54. The court expressly left this question open. *Anthony Pools*, 295 Md. at 298 n.5, 455 A.2d at 441 n.5. Very few courts have found an implied warranty of merchantability in pure service transactions. *Greenfield*, *supra* note 23, at 671; see, e.g., *J.A. Maurer, Inc. v. United States*, 485 F.2d 588 (Ct. Cl. 1973); *Hepp Bros. v. Evans*, 420 P.2d 477 (Okla. 1966); *Cox v. Curnutt*, 271 P.2d 342 (Okla. 1954).

55. *Anthony Pools*, 295 Md. at 298, 455 A.2d at 441.

56. *Id.* at 294-95, 455 A.2d at 439-40.

57. 279 Md. 94, 367 A.2d 935 (1977).

58. See *supra* notes 30-35 and accompanying text.