



Michael D. Klein

Pennsylvania Water Law

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This column will provide overviews of interesting cases and legal issues affecting water suppliers in Pennsylvania.

Contamination incidents and liability

The recent major and well-publicized drinking water contamination incidents that impacted the Charleston, West Virginia and Toledo, Ohio regions have sent shock waves through the water industry and its regulators. Many public water suppliers have responded to these incidents by updating their emergency response plans, vulnerability assessments, and employee training.

Such best management practices can help to avoid drinking water contamination incidents, or mitigate their adverse effects. But there is still cause for concern about the inevitable legal actions that follow these drinking water contamination incidents. In Pennsylvania, municipal, authority and investor-owned water systems face similar exposure to liability for the breach of implied warranty of merchantability under the Uniform Commercial Code ("UCC"). This is akin to a breach of contract action. Municipal and authority water systems, which qualify as "local agencies" under the Political Subdivision Torts Claims Act, ("PSTCA") enjoy immunities and caps for certain negligence actions that are not available to investor-owned water systems. However, investor-owned water systems can take measures to attempt to limit certain liability exposure for interruption or cessation of service through tariff provisions approved by the Pennsylvania Public Utility Commission.

This article focuses on the potential liability of all water systems under the UCC, and also on the tort liability protections available to municipal and authority water systems.

Liability against local agencies is imposed pursuant to the PSTCA, in which a local agency can be liable for a *dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.*

42 PA. CONS. STAT. § 8542(b)(5). The PSTCA limits damages for claims arising from the same cause of action or transaction or occurrence to \$500,000. See *id.* § 8553(b). Although there does not appear to be case law that explicitly says that a "same cause of action or transaction or occurrence" relates to a single event, regardless of how many people are injured or affected, courts have generally treated the clause to mean just that.

In *Gall v. Allegheny County Health Department*, 555 A.2d 786 (Pa. 1989), the plaintiffs sued a municipal water authority,

among others, after they became ill. The plaintiffs alleged that the defendants failed to properly treat the water, leading to a giardia contamination. The Pennsylvania Supreme Court held that the water authority could be sued under section 8542(b) (5) for negligence and under the UCC for breach of the implied warranty of merchantability for selling contaminated water. The case did not discuss a cap on the water authority's liability pursuant to section 8553. However, Pennsylvania courts have consistently held that cases brought pursuant to section 8542 are limited by section 8553. See, e.g., *Smith v. City of Phila.*, 516 A.2d 306 (Pa. 1986); *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d 773 (Pa. Commw. Ct. 2013).

Importantly, *Gall* would not apply to a drinking water contamination incident when 1) it is not the result of a reasonably

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foreseeable risk of the kind of injury that was incurred; and 2) the local agency did not have actual notice or could not reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition. That is because the liability against local agencies is limited to situations in which the utility had sufficient notice and time prior to the dangerous condition to prevent it. See 42 PA. CONS. STAT. § 8542(b) (5). However, damages for a breach of implied warranty of merchantability under the UCC may still be possible and would not be capped at \$500,000 by the PSTCA because that statute only relates to negligence claims against local agencies. See *id.* § 8542(a)(2).

The Commonwealth Court discussed the damages available under the UCC when there is contaminated water in *McKeesport Municipal Water Authority v. McCloskey*, 690 A.2d 766 (Pa. Commw. Ct. 1997). In that case, the plaintiff brought a class action claim for breach of implied warranty of merchantability against a municipal water authority after a giardia infestation. See *id.* at 768. The court stated that the plaintiff was limited to damages provided for under the UCC, which included cover costs and the right to cancel the contract. See *id.* at 772-73 (citing 13 PA. CONS. STAT. §§ 2711-12). The court summarized its holding by saying,

in the instant action the plaintiff is seeking damages for the authority's failure to supply potable water under the express month to month contract he entered with the authority. Such a cause of action may be styled as either an action in trespass based upon averments of negligence, or an action in assumpsit based on the breach of the implied warranty of merchantability. The plaintiff has initiated the instant suit as one in assumpsit, alleging the authority's breach of the implied warranty of merchantability, and not as an action in tort based on the authority's negligence. This cause of action is specifically authorized by the UCC and case law, and the damages alleged by the plaintiff are specifically provided for in the UCC.

Id. at 775.

The damages provided for by the UCC for a breach of warranty generally are the right to cancel the contract, cover costs, and incidental and consequential damages "in a proper case." See 13 PA. CONS. STAT. §§ 2711-15. Consequential damages include, among other things, "injury to person or property proximately resulting from any breach of warranty." *Id.* § 2715(b) (2). Other available incidental and consequential damages are: (1) expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected; (2) any commercially reasonable charges, expenses or commissions in connection with effecting cover; (3) any other reasonable expense incident to the delay or other breach; and (4) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. 13 PA. CONS. STAT. § 2715.

Whether a plaintiff can use the UCC to recover damages resulting from personal injury and thus circumvent the \$ 500,000 statutory cap on negligence damages appears to be an open question. On the one hand, "[f]oreseeability is a key element in the recovery of consequential damages." *Altronics of Bethlehem, Inc. v. Repco, Inc.*, No. 98-4918, 1991 U.S. Dist. LEXIS 9886, at *34 (E.D. Pa. July 15, 1991). "Under the Uniform Commercial Code, § 2-715, for consequential damages to be recovered the damages must result from the buyer's requirements which the seller had reason to know at the time the contract was made." *Frank B. Bozzo, Inc. v. Elec. Weld Div. of Fort Pitt Bridge Div. of Spang Indus.*, 423 A.2d 702, 709 (Pa. Super. Ct. 1980), *aff'd*, 435 A.2d 176 (Pa. 1981). In a breach of warranty claim involving contaminated water, a plaintiff's attorney could point to language like this and argue it was foreseeable that selling tainted water would lead to physical injuries, making those damages recoverable as consequential damages under section 2715 and thus avoiding the \$500,000 cap in the PSTCA.

On the other hand, Pennsylvania courts would probably be hostile to such an argument. See *Matarazzo v. Millers Mut. Grp., Inc.*, 927 A.2d 689, 693 (Pa. Commw. Ct. 2007) (en banc) ("Pennsylvania courts have consistently held that a plaintiff may

not avoid the defense of governmental immunity by couching a claim for the recovery of tort damages under a breach of contract theory."); *Sims v. Silver Springs-Martin Luther Sch.*, 625 A.2d 1297, 1302 (Pa. Commw. Ct. 1993) ("[T]he legislature never intended for a local agency to be held liable for tort damages under a contract theory."). In a recent decision interpreting the scope of the PSTCA, the Pennsylvania Supreme Court stated,

the language of the statute conferring governmental immunity, and of that implementing the exceptions, pertains to conduct causing "injury to a person or property." The Commonwealth Court previously has recognized that these terms reflect the main policy consideration historically underlying tort law, whereas, the central focus of contract law is the protection of bargained-for expectations. In line with the extant understanding of the Political Subdivision Tort Claims Act, we believe the Legislature centered the immunity there conferred on "injury to a person or property" as a reflection of traditional tort jurisprudence.

Meyer v. Cmty Coll. of Beaver Cnty., 2 A.3d 499, 502 (Pa. 2010). Under these holdings, it is unlikely that courts would allow a plaintiff to work around the damages cap by seeking consequential damages for personal injury under a contract theory.

In conclusion, a municipal or an authority water system can be liable for negligence if it dispenses contaminated water, though the situation would not necessarily apply to a sudden chemical spill because of the notice requirement in the statute. Any claim for negligence would be capped at \$500,000 for a single contamination, regardless of how many people became sick. Both a municipal water authority and an investor-owned water system can be liable for dispensing contaminated water under a theory of breach of implied warranty of merchantability. Under the UCC, the damages available include cover costs and incidental and consequential damages. It is unlikely, however, that Pennsylvania courts would allow a plaintiff to use the UCC to avoid the PSTCA and recover personal injury damages.