The Sales-Service Dichotomy: A Roadblock to Consumer Acceptance of Domestic Solar Energy Devices

The United States has become increasingly concerned with the escalating amount of commercial and domestic energy consumption in light of a growing dependency on foreign petroleum sources and the spiraling costs of maintaining readily available energy reserves. National concern over our energy problems, initiated by the Arab oil embargo and sustained by the threat of yearly OPEC price adjustments, has now developed into an explosion of interest relating to the economic, social, and environmental effects of our country's continued petroleum dependency. To resolve this growing problem, research is now advancing into alternative energy forms such as clean burning coal, acceptable nuclear power, thermal steam, and solar energy.

In 1974, Congress enacted two laws that articulated a national policy to develop and encourage a transition to energy systems which employ existing solar technology. The Solar Heating and Cooling Demonstration Act of 1974[1] and the Solar Energy Research, Development, and Demonstration Act of 1974[2] establish guidelines for vigorous research, testing, and demonstration of viable solar technology for the purpose of encouraging domestic, military, and commercial transition away from nonrenewable energy sources.[3] These two acts acknowledge that the development of nonpolluting, long-term solar energy is in the national interest and should be vigorously pursued.

Attractive elements which encourage the development of solar technology are not limited to the reduction of foreign oil dependency or the conservation of domestic oil and natural gas resources. Capturing and transferring the radiation from the sun would provide a clean, inexpensive, and potentially inexhaustible source of energy. Estimates of the amount of solar radiation falling on the continental United States show that this untapped energy source has the potential of providing 740 times the current consumption of electric power presently used in this country. If solar technology were advanced to its fullest, and large-scale energy sources were successfully converted to solar power systems, only .05% of the continental surface of the United States could provide the anticipated energy requirements of the country for the next twenty-five years.[4]

1. 42 U.S.C.A. §§5501-5517 (1977).
2. 42 U.S.C.A. §§5551-5566 (1977).
3. 42 U.S.C.A. §§5501-5551 (1977).
4. BURKE, Legal Impediments to the Widespread Introduction of Solar Energy, in A.L.I. COURSE OF STUDY ON ENERGY AND THE LAW 453, 458-59 (K. Burke ed., 1978) [hereinafter cited as BURKE].

The problems with tapping this source of energy are whether technology can advance rapidly enough, and whether consumers will make a large-scale transition to solar energy equipment before the economic and environmental effect of present petroleum dependency becomes prohibitive of massive transformation. Our technology is many years away from being able to market equipment that can fully capture and maximize this vast energy source. However, solar technology is now approaching a point where large-scale application is feasible.[5] Today it is possible to purchase, on a limited market, solar and heat transfer appliances that will provide both space and water heating or cooling. Unfortunately, such systems are expensive and fall short of maximum efficiency.

The advantages of solar conversion while the industry remains in its earliest stages of commercialization are twofold. First, it would provide some relief for the increasing demand placed upon our present energy sources while providing low cost energy to consumers. But more importantly, the consequence of massive conversion to existing solar technology would be an impetus that would move the industry forward with the development of more efficient and less expensive solar appliances. Such conversion is unlikely to occur until this new industry can produce large-scale consumer confidence in solar technology.

This comment is an examination of the lack of consumer confidence in solar energy devices—one of the basic problems with initiating massive shifts to domestic solar energy devices—and the potential role that the Uniform Commercial Code could play in instilling consumer confidence in these systems. Through the use of warranty protections already in the Code, consumers may be able to protect their investments in solar products where the lack of government and industry regulation and certification continues to foster a lack of consumer confidence.

I. The Problem: A Lack Of Consumer Confidence

The greatest obstacle to widespread transition to domestic solar energy appliances is the lack of consumer confidence in this new industry. Although today the market does contain many varieties of solar energy collectors, solar rock beds, and solar heat exchangers for heating and cooling air and water, rapid conversion in consumer residences has not been forthcoming. As with many new technologies that introduce new products into the market, solar appliances have suffered poor acceptance for several reasons. First, there is a great deal of confusion stemming from a lack of understanding of the functioning of solar devices and of their adaptability to individual homes. Intelligent buyers must consider whether their houses are suitable for a solar appliance by analyzing the amount of available sunlight, the latitude of their homes, the angle of incoming sunlight and

5. 42 U.S.C.A. §5501(a)(3) (1977).

its variations in the differing seasons, wind velocity, and fluctuations in temperature. The consumer must analyze additional factors including insulation presently in the home, storage space for water or gas collector conductors, availability and expense of backup systems, and size of the home.[6] Once all of these factors have been evaluated, the consumer must then search the market for the correct size and type of appliance best suited for his particular residence.

The complexity of the assessment process is further complicated by the lack of any standardization or certification system to assist consumers in evaluating the services of the manufacturers and retail installers.[7] Until such programs and standards are initiated, there is no way of determining whether the solar product is reliable or if the evaluation of the home has been correctly determined. These factors result in a depressed market for domestic solar equipment. Such factors, coupled with the large capital outlay required to install solar products in the home, are responsible for the depressed market for solar appliances. Once the consumer makes the initial decision to invest in a solar product for the home, the discovery of inadequate or nonexistent warranty protection being offered on these new products results in producing a lack of consumer confidence in the technology.

Market-wide warranty protection is foremost in the consumer's mind whenever a purchase entails a large capital outlay or a risk of product performance. Solar energy technology has not advanced to the stage where manufacturers can predict the reliability or long-range performance of their products. Therefore, they are reluctant to continue development and extend more attractive warranty protections until there is a larger public demand for the products. By the same token, the installation of solar space and water heating collectors requires a large capital investment and almost always requires substantial modification of certain parts of the home. Thus, a stagnation of the market results because consumers will not make a large-scale conversion to solar energy until greater warranty protection is given by the manufacturers.

In the last days of the Ninty-Fifth Congress, two acts were passed affecting solar energy products. The National Energy Conservation Policy Act[8] will make available to homeowners necessary loans for solar equip-

6. BURKE, *supra* note 4, at 474-76.

7. Only a few states have enacted testing procedures, minimum efficiency standards, or warranties directed at the solar appliance industry. *See* CAL. HEALTH & SAFETY CODE §§ 1759 to 17959.1 (West Supp. 1979); CONN. GEN. STAT. ANN. §16a-14 (West Supp. 1979); DEL. CODE ANN. tit. 29, §9047(15) (Supp. 1978); FLA. STAT. ANN. §377.705 (West Supp. 1979); LA. REV. STAT. ANN. §30:1154 (West Supp. 1979); MINN. STAT. ANN. §116H.127 (West 1977); N.Y. ENERGY LAW §12-101 (McKinney Pamphlet 1978); OR. REV. STAT. §469.165 (1977).

8. Pub. L. No. 95-619, 92 Stat. 3206 (1978). Several states have passed similar loan programs to encourage consumers to buy alternative energy appliances by supplying the necessary financing. *See* ALASKA STAT. §45.88.010 (Supp. 1978); CAL. HEALTH & SAFETY CODE §41260 (West Supp. 1978), CAL. HEALTH & SAFETY CODE ch. 7 (West Supp. 1978); MASS. ANN. LAWS ch. 170, §26 (Michie/Law. Co-op Supp. 1978), MASS. ANN. LAWS ch. 172, §55 (Mi-

ment from federally insured banks and lending institutions, and the Energy Tax Act of 1978[9] will provide tax incentives for consumers who invest in domestic solar products to conserve energy. In addition, several states have now enacted tax incentives for homeowners investing in solar appliances.[10] Unfortunately, such legislation has fallen short of the stimulus needed to initiate widespread transformation to domestic solar equipment. The likelihood of the development of a comprehensive national energy policy which would include protection of or incentives to consumers does not seem forseeable from either our national government or our state legislatures.[11]

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chie/Law. Co-op Supp. 1978); OR. REV. STAT. §407.048 (1977); VA. CODE §36-55.31:1 (Supp. 1978); W. VA. CODE §31-18A-6 (Supp. 1978).

9. Pub. L. No. 95-618, 92 Stat. 3174 (1978).

10. *See* ALASKA STAT. §43.20.039 (1977); ARIZ. REV. STAT. ANN. §§43-123.37, -128.03 (Supp. 1978); CAL. REV. & TAX. CODE §17052.5 (West Supp. 1979); HAW. REV. STAT. §235-12 (1976), HAW. REV. STAT. §235-12.2 (Supp. 1978); IDAHO CODE §63-3022C (Supp. 1976); ILL. ANN. STAT. ch. 120, §§501d-1,-3 (Smith-Hurd Supp. 1978); IND. CODE ANN. §§6-1.1-12-26,-27 (Burns 1978); KAN. STAT. §79-1118 (Supp. 1978), KAN. STAT. §§79-32166,-32167 (1977), KAN. STAT. §79-45a01 (Supp. 1978); LA. REV. STAT. ANN. §47:1706 (West Supp. 1978); ME. REV. STAT. tit. 36., §§656(1)(H), 1760(1), (38) (1978); MASS. ANN. LAWS ch. 59, §5(45) (Michie/Law Co-op Supp. 1978); MASS. ANN. LAWS ch. 64H, §6(dd) (Michie/Law Co-op 1978); MONT. REV. CODES ANN. §§84-7403, -7404, -7406, -7414 (Supp. 1977); N.H. REV. STAT. ANN. §§72:61 to :68 (Supp. 1977); N.J. STAT. ANN. §54:32B-8(ff) (West Supp. 1978); N.M. STAT. ANN. §7-2-16 (1978); N.Y. REAL PROP. TAX LAW §487-a (McKinney Supp. 1978); N.C. GEN. STAT. §§105-130.23, -151.2, -277(g) (Supp. 1977); OKLA. STAT. ANN. tit. 68, §2357.2 (West Supp. 1978); OR. REV. STAT. §307.175 (1977); R.I. GEN. LAWS §44-3-18 (Supp. 1978); S.D. COMPILED LAWS ANN. §10-6-35.8 (1978); TENN. CODE ANN. §67-511 (Supp. 1978); VT. STAT. ANN. tit. 32, §§5921, 5923 (Supp. 1978).

11. Many states have now established agencies to coordinate and carry out their energy policies, legislation, research, education and energy rights protections. However, as discussed in note 7, *supra* very few states have taken action to protect solar appliance consumers. The state agencies now in existence have the potential and ability to protect solar energy consumers either by enforcing existing state laws, or by promulgating new regulations and enacting new legislation to protect the consumer investing in alternative energy sources. *See* ARK. STAT. ANN., ch. 13 (Supp. 1977); CAL. PUB. RES. CODE, Division 15 (West Supp. 1976); CONN. GEN. STAT. ANN., ch. 295 (West Supp. 1979); DEL. CODE ANN. tit. 29, ch. 94 (Supp. 1978); GA. CODE ANN. §40-433 (Supp. 1978); HAW. REV. STAT. ch. 196 (1976), HAW. REV. STAT. §103-71 (Supp. 1978); ILL. ANN. STAT. ch. 93, §301 (Smith-Hurd Supp. 1978), ILL. ANN. STAT. ch. 96 ½ (Smith-Hurd Supp. 1978); IOWA CODE ANN. ch. 93 (West Supp. 1978); KAN. STAT. §74-6802 (Supp. 1977); 1978 KY. REV. STAT. & RULES SERV. 582; LA. REV. STAT. ANN. §30:504 (West 1975); ME. REV. STAT. tit. 5., §5505 (1979); MINN. STAT. ANN. §§473.05(1), -.859 (West Supp. 1979); MINN. STAT. ANN. §500.30 (West Supp. 1978); MONT. REV. CODES ANN. §84-7410 (Supp. 1977); NEV. REV. STAT. §523.031 (1977); N.J. STAT. ANN. §52.25F-1 (West Supp. 1978); N.M. STAT. ANN. §71-6-1 (1978); N.Y. ENERGY LAW §5-101 (McKinney Pamphlet 1978); OHIO REV. CODE ANN. ch. 1551 (Page 1978), OHIO REV. CODE ANN. §122.64 (Page 1978); OKLA. STAT. ANN. tit. 74, §3361 (West 1976); OR. REV. STAT. §469.030 (1977); PA. STAT. ANN. tit. 66, §458.1 (Purdon Supp. 1978); TENN. CODE ANN. §4-2803 (1978); TEX. REV. CIV. STAT. ANN. art. 4413(47b) (Vernon Supp. 1978); UTAH CODE ANN. §63-53-2 (1978); VT. STAT. ANN. tit. 2, §601 (Supp. 1978); VA. CODE §10-214 (Supp. 1978), VA. CODE §55-353 (Supp. 1978). WASH. REV. CODE ANN. §43.21F.040 (Supp. 1977); W. VA. CODE §5-17-2 (1979).

The public is left with a choice of either (1) accepting inadequate one-year warranties on only mechanical and electronic parts or receiving no warranty protection at all, or (2) waiting to convert to solar energy until more attractive protections appear on the market. Full performance warranties desired by consumers are rarely given and many times must be privately negotiated.[12]

The Uniform Commercial Code warranty protections, if applicable to solar appliances, may provide a possible solution to the lack of consumer confidence in the presently existing solar market and may give appliance owners who do not have adequate warranty protection some relief if solar equipment fails to perform properly. Solar energy systems would seem to fall under the warranty protection sections of the Code because they appear to be "goods" within the meaning of Article Two. "'Goods' mean 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. . . ."[13] Central to this Code provision is the concept of "movability,"[14] which brings all movable goods under the express warranty protections of §2-313[15] and §2-316,[16] the implied warranty of merchantability protection of §2-314,[17] and the implied warranty of fitness for a particular purpose protection found in §2-315.[18] Consumers able to show that their solar devices come within the purview of §2-105's definition of "goods" would have the same remedies as in any other breach of a contract

12. BURKE, *supra* note 4, at 501-02.

13. U.C.C. §2-105(1) (1970 version).

14. *See* U.C.C. §2-105 comment 1 (1952 version).

15. U.C.C. §2-313(1) (1970 version) provides for the creation of express warranties by the seller in three ways. The seller who makes an affirmation of fact or makes any promise relating to the goods, gives a description of the goods, or uses any sample or model of the goods to be sold is deemed to have created an express warranty if the affirmation, promise, description, model or sample became a part of the basis of the bargain. *But see* U.C.C. §2-313(2), which makes statements by the seller concerning an opinion toward or commendation of the goods not a part of the basis of the bargain. U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043, 1046 (6th Cir. 1975); Sessa v. Riegle, 427 F. Supp. 760, 765-67 (E.D. Pa. 1977), *aff'd*, 568 F.2d 770 (3d Cir. 1978); Olin Mathieson Chem. Corp. v. Moushon, 93 Ill. App. 2d 280, ___, 235 N.E.2d 263, 264 (1968); Young & Cooper, Inc. v. Vestring, 214 Kan. 311, ___, 521 P.2d 281, 290 (1974).

16. U.C.C. §2-316 (1970 version) allows the exclusion or modification of all express warranties but establishes guidelines for the construction of any language which would alter warranty protections given in the sale.

17. U.C.C. §2-314 (1970 version) establishes an implied warranty of merchantability if the seller is a merchant who deals in goods of that kind. The Code sets out tests for merchantability including comparisons with trade standards and variations in quality or quantity, and whether the goods are fit for the ordinary purpose for which they are to be used.

18. U.C.C. §2-315 (1970 version) provides for an implied warranty that the goods be fit for a particular purpose. When the seller knows of the particular purpose for which the buyer intends to use the goods, and when the seller knows that the buyer is relying upon his skill and judgment, the Code will imply a warranty that the goods are in fact fit for the purpose intended.

for sale found under §§2-711 to 2-721.[19]

Assuming that domestic solar appliances are covered by Article Two, the buyer need show only: (1) that the seller made a warranty, either express or implied; (2) that the solar appliance did not comply with the warranty that was made at the time of the sale; (3) that the failure of the equipment to live up to the warranty was the proximate cause and the cause in fact of the injury to the buyer; (4) that actual damages were incurred; and (5) that there were no affirmative defenses existing to deny recovery (such as discharge of liability, statutes of limitations, privity of contract, or lack of notice).[20] If it could be shown that the products bought by the consumer were within the definition of "goods," it appears that the Uniform Commercial Code would have the necessary solution to bolster consumer confidence in these products. Such a cause of action would provide buyers of solar appliances with an additional protection, enforcable at law, going beyond warranties given by manufacturers or those contracted for privately. This cause of action would motivate industry to continue to develop better solar products. Such motivation would come from the added demand for the appliances and the threat of liability extending from the warranty protections in the Code.

The fact that these enforceable warranty provisions of the Uniform Commercial Code are already in existence through widespread codification in state statutes makes consumer protection through the Uniform Commercial Code particularly attractive. Consumers would not have to wait until the federal and state governments eventually decide to certify, regulate, or insure liability for the solar appliance industry. The industry, in turn, would have the needed impetus to continue development and production of better products eventually culminating in more reliable equipment and more attractive warranties. There is one drawback to this apparent panacea for consumer problems. This problem is the distinction between "goods" and "services" under the Code.

II. The Sales-Service Dichotomy

The major roadblock to extending Article Two protection to solar energy devices for domestic use is that many courts have held that the warranty protections of the Code do not apply to transactions in goods when services are part of the contract. Most construction and home improvement con-

19. *See* U.C.C. §2-711 (1970 version) (buyer's remedies and security interest); §2-712 (concept of "cover"); §2-713 (damages upon repudiation or nondelivery by seller); §2-714 (damages for breach after acceptance of goods); §2-715 (incidental and consequential damages); §2-716 (specific performance and replevin); §2-717 (deduction of damages from the price); §2-718 (liquidated damages and deposits); §2-719 (contractual modification on limitation of remedy); §2-720 (cancellation or recission on claims for antecedent breach); and §2-721 (remedies for fraud).

20. J. White and R. Summers, Handbook on the Law Under the Uniform Commercial Code 272-73 (1972).

tracts have been viewed by the courts as contracts for labor and materials rather than contracts for goods subject to the protection of Article Two.[21] Thus, whenever contracts for products include labor or installation, the protection of the Code has been denied many times under this decisional exception.

This judicial doctrine, sometimes referred to as the sales-service dichotomy,[22] provides that where goods and services are involved in a contract and the contract is predominantly service oriented, the courts will construe the transaction as if there had been no sale of goods at all and deny all warranty protection. Such application of a sale-service distinction to consumer contracts results in the barring of implied warranties even though the desire for the goods is often the only interest of the buyer.

Professor Farnsworth has pointed out that four distinct rules were developed at common law to distinguish a sales contract from a contract for services:[23] the English rule,[24] the New York Rule,[25] the Massachusetts rule,[26] and what Professor Farnsworth has labeled the "Essence Test."[27] Under the essence test, the court's inquiry centers on whether the work performed or whether the materials supplied in the transaction were the essence of what the parties contracted for.[28]

Although these four rules arose from contests over Statute of Frauds problems, they were expanded by courts to apply to and control other

21. 1 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE, §2-105:11, at 230 (2d ed. 1970).

22. Comment, *Sale of Goods in Service-Predominated Transactions*, 37 FORD. L. REV. 115 (1968).

23. Farnsworth, *Implied Warranty of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 663 (1957).

24. The English Rule held that if the contract called for the production of a chattel that could be sold, there could be no action for a breach of a service contract. However, if the labor involved in carrying out the agreement produced no chattel that could be sold, there would be no action for a breach of a contract to sell goods. Lee v. Griffin, 121 Eng. Rep. 716, 718 (Q.B. 1861).

25. The New York Rule established the proposition that whenever a contract was for goods not in existence at the time of the making of the contract, the court would presume the transaction to be one for services. Parsons v. Loucks, 48 N.Y. 17, 19 (1871).

26. The Massachusetts Rule held that if goods are especially manufactured for the buyer and are not suited for sale in the ordinary course of business, then they are not considered goods, and the contract is one for services. Goddard v. Binney, 115 Mass. 450, 454 (1874). This rule was substantially adopted by the Uniform Sales Act in applying the act to Statute of Frauds problems: "The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply." UNIFORM SALES ACT §4(a)(2) (1950 version).

27. Clay v. Yates, 156 Eng. Rep. 1123-25 (EX. 1856). *See also* Robinson v. Graves, [1935] 1 K.B. 579-80.

28. *Id.*

actions dealing with hybrid sales-service transactions. American courts have predominantly followed the essence test,[29] which has resulted in findings that many contracts involving goods were not considered to be within the coverage of the Uniform Commercial Code or the Uniform Sales Act.

The most important case in the development of widespread acceptance of the sales-service dichotomy was *Perlmutter v. Beth David Hospital.*[30] An action for personal injury damages arose when plaintiff received a blood transfusion which was infected with hepatitis. Plaintiff sought recovery under an implied warranty theory alleging that the supplying of the blood was a sale within the Uniform Sales Act.[31]

Central to the *Perlmutter* case was the issue of whether the transaction of selling blood to plaintiff was such a sale, or whether it was part of the services that the patient contracted for upon entering the hospital for treatment. Although admitting that title to the blood had transferred from the hospital to plaintiff, the court found that this did not make the transaction a sale.[32] Adopting the essence theory, the court pronounced what has become the predominant test of determining what theory of recovery would be allowed in hybrid sales-service cases. "[W]hen service predominates, and transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act."[33]

Perlmutter was based on a twofold rationale. First, liability in warranty was denied, based on the contract theory that the patient bargained for

29. Farnsworth, *Implied Warranty of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 663-64 (1957). *See also* Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 580 (7th Cir. 1976); Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974); North Am. Leisure Corp. v. A & B Duplicators, Ltd., 468 F.2d 695, 697 (2d Cir. 1972); Wise & Co. v. Rand McNally & Co., 195 F. Supp. 621, 625 (S.D.N.Y. 1961); Fifteenth Street Inv. Co. v. People, 102 Colo. 571, 81 P.2d 764, 769 (1938); Foley Corp. v. Dove, 101 A.2d 841, 842 (D.C. 1954); Owen-Fields, Inc. v. Sudow, 67 S.D. 297, 292 N.W. 110, 111 (1940).

30. 308 N.Y. 100, 123 N.E.2d 792 (1954).

31. *Id.* at 793. Recovery was sought under the implied warranties that the blood was fit for the particular purpose for which it was used and that it was of merchantable quality. The Uniform Sales Act set forth the Implied Warranties of Fitness for a Particular Purpose and Merchantability as follows:

> (1) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
>
> (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

UNIFORM SALES ACT §15(1), (2) (1950 version). Support for this theory was based on the idea that as a patient in the hospital, plaintiff contracted to receive "room and board and the usual hospital facilities . . . and services" and that the blood used in a transfusion was sold separately for sixty dollars. 308 N.Y. at ____, 123 N.E.2d at 793.

32. 308 N.Y. at ____, 123 N.E.2d at 794.

33. *Id.*

services and not for specific items such as drugs or blood.[34] The second, and better, reason for the decision was that the court was fearful of imposing liability on hospitals for infected blood, making them, in effect, absolute insurers against risks that could not be detected or controlled.[35] This rationale has attracted widespread acceptance in protecting hospitals and blood banks from liability,[36] but the *Perlmutter* rule has received criticism from both courts and commentators.[37]

III. Blind Application Of The Sales-Service Distinction Will Hinder Expansion Of Solar Protections Under The Code

It is unfortunate that the rule in *Perlmutter* has not been limited to shielding hospitals under the public policy rationale of the decision. What

34. "Such a contract is clearly one for services, and, just as clearly, it is not divisible. Concepts of purchase and sale cannot separately be attached to the healing materials—such as medicines, drugs or, indeed, blood—supplied by the hospital for a price as part of the medical services it offers. That the property or title to certain items of medical material may be transferred, so to speak, from the hospital to the patient during the course of medical treatment does not serve to make each such transaction a sale." *Id.* at 794.

35. Public policy dictates that because the need for blood is so great, while the chance of infection is small and where there is no known method of detection of the virus, that burden would be too great on hospitals to have to bear the risk for contaminated blood. "[W]here no negligence or fault is present, liability should not be imposed upon the institution or agency actually seeking to save or otherwise assist the patient." *Id.* at 795.

36. The majority of jurisdictions have accepted the *Perlmutter* rationale to protect hospitals from warranty liability. *See* Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105, 106-08 (D. Colo. 1964); St. Luke's Hosp. v. Schmaltz, 188 Colo. 353, 534 P.2d 781, 783-84 (1975); Fischer v. Wilmington Gen. Hosp., 51 Del. 554, ___, 149 A.2d 749, 753 (1959); Baptista v. Saint Barnabas Medical Center, 109 N.J. Super. 217, ___, 262 A.2d 902, 906-07 (1970), *aff'd per curiam*, 57 N.J. 167, 270 A.2d 409 (1970); Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 278-79, 156 S.E.2d 923, 925 (1967); Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, ___, 364 P.2d 1085, 1086-88 (1961); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, ___, 296 P.2d 662, 665-67 (1956). For cases applying the *Perlmutter* rationale to protect blood banks from liability, see Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, ___, 402 P.2d 584, 584-86 (1965); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, ___, 132 N.W. 2d 805, 810 (1965); Goelz v. J. K. & Susie L. Wadley Research Inst. & Blood Bank, 350 S.W.2d 573, 576-77 (Tex. Ct. App. 1961); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, ___, 127 N.W.2d 50, 52-54 (1964).

37. *See* Farnsworth, *Implied Warranty of Quality in Non-Sales Cases*, 57 Colum. L. Rev. 653, 662-63 (1957); 69 Harv. L. Rev. 391 (1955); Note, *Sales: Implied Warranty: Blood Transfusions*, 18 Okla. L. Rev. 104 (1965); Russell v. Community Blood Bank, Inc., 185 So.2d 749, 752-55 (Dist. Ct. App. 1966), *modified*, 196 So.2d 115, 117-18 (Fla. 1967); Cunningham v. MacNeal Memorial Hosp., 113 Ill. App.2d 74, ___, 251 N.E.2d 733, 736-39 (1969); Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, ___, 232 A.2d 879, 884 (1967), *rev'd per curiam on other grounds*, 53 N.J. 138, 249 A.2d 65 (1969); Hoffman v. Misericordia Hosp., 439 Pa. 501, ___, 267 A.2d 867, 868-71 (1970). Other cases have avoided the sales-service dichotomy spawned by *Perlmutter* by applying a strict tort liability to infected blood or by protecting hospitals from liability through statute. *See* Sawyer v. Methodist Hosp., 522 F.2d 1102, 1105 (6th Cir. 1975); Williamson v. Memorial Hosp., 307 So.2d 199 (Fla. Dist. Ct. App. 1975); *contra*, St. Luke's Hosp. v. Schmaltz, 188 Colo. 353, ___, 534 P.2d 781, 784 (1975).

is disturbing is that many courts have expanded the holding to cover any commercial transaction in which there is a hybrid sales-services contract. This blind adherence to the sales-service distinction is the greatest roadblock to the application of warranty protections to solar domestic appliances. Every consumer who purchases such products will need to have some labor performed on his home to adapt it to the appliance. This may include preparation of the roof, installation of additional plumbing and electrical connections, and the installation of liquid or gaseous storage and collector units.

Applying the rule remorsefully, courts have prohibited warranty protection for goods involved in contracts to install air conditioning systems and heating furnaces,[38] to furnish structural steel,[39] to install plumbing for homes,[40] and to build pools.[41] If the courts continue to adhere blindly to the sales-service distinction, the consumer of solar appliances will be denied warranty protection even when his sole aim is to bargain for and purchase only the appliance.

An argument has been made that the Uniform Commercial Code has eliminated the denial of warranty protection whenever service is involved in the transaction of goods.[42] Section 1-102[43] of the Code sets forth the drafters' goal of liberalizing the application of the statute to commercial transactions in an effort to simplify and clarify this area of the law.[44] The

38. Mingledorff's, Inc. v. Hicks, 133 Ga. App. 27, 28, 209 S.E.2d 661, 662 (1974).

39. Schenectady Steel Co. v. Bruno Trimpoli Gen. Constr. Co., 43 App. Div. 2d 234, ____, 350 N.Y.S.2d 920, 922-23 (1974).

40. Meyn v. Ross, (Pa. Ct. Common Pleas, Northumberland County, Oct. 7, 1971), *reported in* 9 U.C.C.Rep. Serv. 1357, 1359 (1971).

41. Gulash v. Stylarama, 33 Conn. Supp. 108, ____, 364 A.2d 1221, 1223-24 (1975); Ben Constr. Corp. v. Ventre, 23 App. Div. 2d 44, ____, 257 N.Y.S.2d 988, 989-90 (1965).

42. Comment, *Sale of Goods in Service-Predominated Transactions*, 37 FORD. L. REV. 115, 116-17 (1968). The author sets forth the proposition that the Uniform Commercial Code should be viewed as overruling the sales-service distinction. Warranty protections should attach whenever there is a passing of title in a transaction involving movable, identifiable goods because such a transaction is a "sale" under Article Two. "[T]he code contains no requirement that the sale not be accompanied by a service. To hold that there is no sale where there is also a service involved seems inconsistent." *Id.* at 117. Professor Farnsworth argues that the Uniform Commercial Code should not be interpreted as prohibiting warranty protections in service related contracts merely because the transaction is not labeled a technical sale under the *Perlmutter* analysis. "To say that a warranty is implied in a sale is not to say that none is implied if there is no sale." Farnsworth, *Implied Warranty of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 665, 662 (1957).

See also Newmark v. Gimbel's Inc., 102 N.J. Super. 279, ____, 246 A.2d 11 (1968), *aff'd*, 54 N.J. 585, 258 A.2d 697 (1969), in which the court stated that warranty protection should attach whenever there is a transfer of goods from seller to buyer. "The policy reasons applicable in the case of sales would likewise justify the extension of liability for breach of warranty to any commercial transaction where one person supplies a product to another, whether or not the transaction be technically considered a sale." 102 N.J. Super. at ____, 246 A.2d at 15.

43. U.C.C. §1-102 (1970 version).

44. Lynch v. County Trust Co., 404 F.2d 1149, 1151-52 (2d Cir. 1968).

continued application of the sales-service distinction undercuts one of the primary goals of the Code, which is to detechnicalize commercial law and protect consumer interests.[45] Nordstrom argues that the denial of warranty protection when the transaction is couched in service terms should be rejected completely.[46] Other courts have held that, even when service is in the contract, warranty protection should be extended to cover the goods passing from the seller to the buyer. Warranty protection has been given in contracts for the construction of a one-million-gallon water tank,[47] the supplying of structural steel for a bridge,[48] the installation of bowling equipment and lanes,[49] the installation of plumbing and equipment for air conditioning and heating systems,[50] the installation of a drying kiln,[51] the pouring of large slabs of concrete,[52] and even for the supplying of an electrified low-voltage floor for amusement purposes.[53]

The courts in these cases looked to the language of the parties and the desire of the buyer in bargaining for the item regardless of the substantial service-related aspects in the transaction. "The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose . . . is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved. . . ."[54] Following this trend, several courts have applied the Code warranty protections to transactions of goods where services admittedly were the predominant part in the transaction.[55]

IV. CONCLUSION

At the present time there is a great need for large-scale conversion to

45. J. WHITE AND R. SUMMERS, HANDBOOK ON THE LAW UNDER THE UNIFORM COMMERCIAL CODE 15 (1972).

46. R. NORDSTROM, HANDBOOK ON THE LAW OF SALES 47 (1970).

47. Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572, 579-80 (7th Cir. 1976).

48. Belmont Indus., Inc. v. Bechtel Corp., 425 F. Supp. 524, 527-28 (E.D. Pa. 1976); Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 400 F. Supp. 273, 277 (E.D. Wis. 1975).

49. Bonebrake v. Cox, 499 F.2d 951, 957-60 (8th Cir. 1974).

50. Kunian v. Development Corp. of America, 165 Conn. 300, ___, 334 A.2d 427, 431 (1973); Gable v. Silver, 258 So.2d 11, 14 (Fla. Dist. Ct. App. 1972); Worrell v. Barnes, 87 Nev. 204, ___, 484 P.2d 573, 576 (1971).

51. Cleveland Lumber Co. v. Proctor & Schwartz, Inc., 397 F. Supp. 1088, 1092 (N.D. Ga. 1975).

52. Port City Constr. Co. v. Henderson, 48 Ala. App. 639, ___, 266 So. 2d 896, 899 (1972); Aced v. Hobbs-Sesack Plumbing Co., 55 Cal.2d 573, ___, 360 P.2d 897, 901-03, 12 Cal. Rptr. 257, ___ (1961).

53. Aluminum Co. of Am. v. Electro Flo Corp., 451 F.2d 1115, 1118 (10th Cir. 1971).

54. Bonebrake v. Cox, 499 F.2d at 960.

55. Foster v. Colorado Radio Corp., 381 F.2d 222, 226 (10th Cir. 1967); Newmark v. Gimbel's, Inc., 102 N.J. Super. 279, ___, 246 A.2d at 11, 15 (1968).

alternative energy sources to relieve the growing dependency on nonrenewable energy sources. Article Two applies to transactions in goods and nowhere does it prohibit the extension of warranty protection to transactions in which service is a part of the bargain. The extension of the Code warranty protections to solar appliances would provide the necessary protection to bolster consumer confidence in the industry, stimulate the market, and adequately protect the rights of those who invest in the devices until the evolution of more adequate governmental and industry regulation.

Other available means for redressing property and personal damages stemming from solar appliances (beyond the present Uniform Commercial Code provisions) would include actions for breach of contract, fraud or misrepresentation, and products liability. Also, the federal Magnuson-Moss Act[56] and the Fair Packaging and Labeling Act[57] could conceivably be used to enforce the expectations of consumers in buying solar appliances.

Courts and attorneys should re-examine the rationale of the sales-service distinction in the light of the undue reliance on the *Perlmutter* analysis. Abandoning the antiquanted sales-service dichotomy would be the single most important stimulus in encouraging domestic energy transformation to available solar appliances.

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56. 15 U.S.C.A. §§2301-2312 (1974).
57. 15 U.S.C.A. §§1451-1461 (1966).