

# **The State of the State: A Guide to Billing and Debt Collection Practices within Georgia's Water and Wastewater Utility Service Industry**

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*Please note that this document is intended merely as a guide to local government water/wastewater utilities in Georgia. You should seek legal or other professional advice before acting or relying on any of the content.*

The purpose of this memorandum is to guide the reader (generally) through the legal framework upon which water/wastewater utility services are established, operated and provided in the state of Georgia. It further seeks to inform the reader of the relevant case law that has shaped the industry's legal governance in providing water/wastewater utility services. Although no particular conclusions are to be drawn, the material should be helpful in terms of understanding how utilities are created and what practices their managers may employ with respect to billing and debt collection, the very things that make the provision of these utility services possible.

### **I. Establishing a Utility Account: The Separation of Local Powers**

Generally, state law provides local governments with broad authority to act on behalf of its constituents. Concerning the operation of water utility services, some state codes provide specific direction to local governments through statutory enabling legislation while other codes merely establish the legal authority upon which a public utility may be established. As this legal authority is often broad in nature, it is generally accepted that local governments have significant flexibility in structuring their utility operations.

In Georgia, Title 36 of the Official Code of Georgia (OCGA) concerning local government provides the foundations upon which the various units of local government may offer water and wastewater services. Title 36 is subdivided into four parts pertaining specifically to “Counties,” “Municipalities,” “Counties and Municipalities” and “Other Government Entities.”

To properly understand how a unit of local government may administer its water utility services, one must first understand the legal foundation upon which the utility operates. Some utilities might be operated by the city or county while others may operate as a local authority designated to handle such specific tasks as providing water and/or wastewater services. Still, other utilities may be privately owned and thereby operate under a contractual agreement with a local government to provide water utility services to the jurisdiction's constituents and customers. To date, this author is unaware of any purely private water utility service providers with no connection to local government.

With 159 counties and several hundred cities throughout Georgia, it may be said with certainty that water utility services are offered in a variety of different manners, including the financial practices at each of the respective utilities.

#### **A. Rate Structures**

Rate structuring receives a great deal of leeway within the industry, yet is also a very important aspect of water utility service management. Since the determination and imposition of rates is not within the administrative reach of the Public Service Commission, the local utility managers (or governing bodies) appear to have relative free reign on fixing their price schedules. Furthermore, the only statutes that appear to govern water utility service rates are the same ones addressed in OCGA Title 36 relating to "rates, fees and other charges" that a given utility may assess upon its customers (as indicated above in Section I, above, and subsection B., below). In sum, the underlying foundation of state law justifying such relative freedom in rate setting merely requires that rates be reasonable and adequately addressed in a contractual agreement by the utility with the customer before services are provided.

That said, rates structures received some early attention in the various Georgia courts, several of which were ultimately addressed by the Supreme Court of Georgia. Although rate setting *per se* has remained largely unchallenged in Georgia, the courts have been called upon from time to time to address unique circumstances. Synopses of the most important Georgia cases are as follows:

**1. Washington Water & Electric Co. v. Pope Mfg Co. (Ga. 1932)**

In this case before the Supreme Court of Georgia, the questions addressed were:

- 1) Whether a water utility service company was required to provide water for fire extinguishing purposes to a city's inhabitants in absence of a contract, and
- 2) How much the company may charge, in absence of any contract, for such services in consideration of any public service duty for the general welfare of the city's inhabitants

Properly framed, the second question to be decided in *Washington Water and Electric* addressed the issue of what rates may be charged for necessary public services provided outside a contractual agreement.

In answering the above questions, the Court held that the “Water company under contract to furnish water to the *city* of Washington for fire extinguishing purposes (...) was not required to furnish *inhabitants* with water for fire extinguishing purposes, except as required by its character as public service corporation.” (*Italics added.*)

Concerning rates for fire extinguishing water, the Court further held that the “water company could declare its own rates for services rendered as a public service corporation in providing *inhabitants* of city of Washington water for fire extinguishing purposes, where company's contract with city did not specify rates therefore, provided

rates were reasonable.”<sup>1</sup> (*Italics added.*)

In light of the Court’s holding, *Washington Water and Electric* seems to offer support for the idea that the Georgia courts consider and honor the concept of reasonableness in connection with rate structures and prices for utility services offered for a public purpose *outside of any contractual agreement*. Two years later, the Court indirectly addressed the reasonableness of rates specified under contract with both resident and non-resident customers.

## **2. *Collier v. City of Atlanta, (Ga. 1934).***

In this case, the Supreme Court of Georgia was called upon to address another aspect of rate structuring. The pertinent question before the *Collier* court was whether the City of Atlanta (Fulton County) could charge *non-resident* customers in the City of North Atlanta (De Kalb County) a higher percentage for rates in connection with services provided outside the reach of Atlanta’s geo-political jurisdiction.

Answering the question presented to it, the Court unanimously held in pertinent part that:

[1] (1) The city of Atlanta has authority under its charter to extend its water mains beyond the city limits and into the territory of the adjacent county of De Kalb, and to supply persons in such outlying territory with water service, and to charge persons for such service as may be supplied to them on their request. (*Italics added.*)

[3] (b) The city may not compel any person in such outlying territory to accept the water service which it undertakes to provide, nor may the city be compelled to render water service to such person where it has not voluntarily contracted to do so. (*Italics added.*)

[4] (c) The city may, by ordinance in pursuance of its charter powers, classify

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<sup>1</sup> 176 Ga. 155, 167 S.E. 286, quoting from the Court’s syllabus opinion addressing the holdings of its decision. Furthermore, it is also important to note that the Court based its decision on laws applicable at the time, cited as Laws 1894, p. 190, § 10; Laws 1898, p. 287, § 4; Civ. Code 1910, § 2923. That said, laws change from time to time and the legislature is not prohibited from changing its statutory scheme so as to require otherwise in opposition to this case’s holding, its pre-existing progeny, or any subsequent decisions addressing similar issues.

rates to be charged in such outlying territory for service to be rendered therein, and provide for cutting off water supply to customers for failure to pay their bills. (Italics added.)

[5] (d) The fact that rates are prescribed that are higher than those fixed within the city limits will not render the rates charged in such outlying territory objectionable as offending the due process and equal protection clauses of the State and Federal Constitutions (Const. Ga. art. 1, § 1, par. 3; [Const. U. S. Amend. 14.](#))

(e) Nor will the fact that the rates fixed applicable to the outlying territory include a 25 per cent increase over former rates in such territory, for the purpose of paying the costs of extending a new and larger water main rendered necessary to supply a larger amount of water to certain of the outlying territory, render such rates objectionable as offending the above-mentioned provisions of the Constitution, or as creating an illegal discrimination. (Italics added.)<sup>2</sup>

In *Collier*, the Court showed great deference to the autonomy granted to the city of Atlanta under its corporate charter and local governing ordinances. The decision thus provided precedent for local governments to establish water utility rates in a manner deemed fit for effective operation of the given utility. To date (seventy-five years later), *Collier* still appears to provide the precedential foundation for local governments to establish rates in a manner deemed necessary to effectively and efficiently provide water utility services to non-resident customers, so long as a reasonable basis exists for such variation under the City's corporate charter.

## **B. Deposit, Service Activation and Late Fees.**

In addition to assessing rate structures for services provided, water utility operators in Georgia are entitled to contract for reasonable deposit, service activation and late fees under various chapters in Title 36 of the Official Code of Georgia. The authority under which such fees may be assessed, however, depends on the legal nature of the actual service provider, which are broken down under O.C.G.A. into four categories.

### **1. Counties**

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<sup>2</sup> 178 Ga. 575, citing Justice Atkinson's syllabus opinion, which was the only textual analysis appearing in the opinion as retrieved from Westlaw on 7/23/2010.

Concerning utilities operated by a Georgia county, OCGA §36-1-26 provides that “the governing authority of any county may authorize the execution of (...) contracts which specify the rates, fees, or other charges which will be charged and collected by the county for (...) water utility services to be provided by the county to one or more of its utility customers.”

Based on this language, county governments in Georgia appear to have an express right to charge reasonable deposit, service activation and late fees to their customers in relation to any water utility services provided. To be legally effective, such fees must be addressed in a valid and binding contract between the given county and the customer receiving the services provided.

## **2. Cities**

Whereas the counties of Georgia are created and operated as political subdivisions of the state, the cities of Georgia operate as municipal corporations within the said counties. The Georgia General Assembly has declared the term “municipal corporation” to be synonymous with “town, municipality and city.”

OCGA §36-34-1 provides municipal corporations with the statutory authority to exercise common functions of local government. Concerning the provision of water utility services, these powers most likely mirror those of the Georgia counties. Furthermore, Article 1, Section 2, Paragraph 7 of the Georgia Constitution of 1976 also provides that OCGA §36-34-1 does not prohibit municipal governing authorities or a municipality’s citizens from choosing how such powers shall be exercised.

In addition to the requisite statutory authority needed for operating on behalf of its citizens, municipal corporations should also address such authority to act within their

respective municipal charters. In particular, the charter should expressly declare the authority to charge deposit, service activation and/or late fees in relation to any water utility services provided to a given customer. Once these rights are addressed in the city's charter, the legal foundation and authority for providing water utility services will become adequately solidified.<sup>3</sup>

As with the Georgia counties though, any fees and assessments charged by a Georgia municipality must first be addressed in a contractual agreement signed by the customer with the entity providing such services.

### **3. Counties and Cities' right to Contract with Private Entities**

Under OCGA §36-60-15.1, both the counties and cities of Georgia are expressly authorized to contract or lease the operations of their water utility services to private organizations. In pertinent part, the pertinent statutory language provides that:

(...) any county or municipal corporation of this state is authorized ... to enter into valid and binding leases and contracts with private persons, firms, associations, or corporations ... to provide for the operation and maintenance of all or a portion of its waste-water treatment system, storm-water system, water system, or sewer system ... which leases and contracts may include provisions for the ... operation of the system (...).

Likely included within this language is the right for a private entity to charge deposit, service activation and late fees so as to ensure the financial viability of the utility's

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<sup>3</sup> See *Dodd v. City of Atlanta*, 154 Ga. 33, 113 S.E. 166 at 168, (1922), generally acknowledging that the authority to make certain water connections and to assess the cost(s) thereof are granted to the city in its charter. Although the case suggests that this right of assessment may attach to the property itself, recent case law [*Freddie Mac v. City of Atlanta* (Ga. 2009)] placed limitations on that practice. However, the point to be taken is that a city's right to assess certain fees in connection with services offered should be addressed in the city's corporate charter identifying the purposes and authority for its operations. See also *Washington Water & Electric Co. v. Pope Mfg. Co.* 176 Ga. 155, 167 S.E. 286 (Ga. 1932), (providing that "The General Assembly has not conferred upon the Public Service Commission or other like body any power to fix and determine water rates, and the only power granted to the particular municipality is contained in the charter provisions referred to. In the absence of a delegation of additional authority upon the subject, the city of Washington had no power to regulate or control rates for the public service of furnishing water to itself or its inhabitants, except by a contract with the corporation or person rendering such service.)

operations on behalf of the given unit of local government in Georgia. Concerning rate structures, the private entity most likely sets its rates with the advice and consent of the applicable governing authority. In any event, such rate setting should still follow the principle of reasonableness and financial viability, regardless of process by which the actual rate is reached.

#### **4. Counties, Cities, and Other Governmental Entities: ‘Local Authorities’**

A fourth and final method for providing water utility services in Georgia comes by way of Local Authorities, which have been defined under OCGA §36-80-17(a) as “an instrumentality of one or more local governments created to fulfill a specialized public purpose (...),” including the provision of water and/or waste water treatment services.

Under subsection (b), the statute further provides that “the governing body of any local authority which is authorized to provide (...) water utility services in this state may authorize the execution of one or more contracts which specify the rates, fees, or other charges which will be charged and collected by the local authority for (...) water utility services to be provided by the local authority to one or more of its utility customers.”

As with the other three mediums of providing water utility services in Georgia, these fees likely include deposit, service activation and late fees in connection with any water utility services provided to the local authority’s customers. Yet again, such rates are applicable and enforceable only by way of a valid contractual agreement by the customer with the authority consenting to the terms of service therein.

### **C. Credit History as Predicate for Providing Water Utility Services**

#### **1. County and City Governments**

Prior to contracting with a customer for water utility services, the respective utility operators may access a credit report of prospective applicants from one or more consumer reporting agencies before any services are rendered.<sup>4</sup> As there are no specific provisions under the Official Code of Georgia prohibiting such action, this authority is further justified by silence of state legislature. However, the Federal Fair Credit Reporting Act of 2007 [(15 USC §1681(b))] establishes several safeguards concerning the privacy rights of the consumer being investigated.<sup>5</sup>

## **2. Private Entities and Local Authorities**

Concerning any private entities or local authorities that may provide water utility services, the right to conduct a credit check likely exists under normative methods of private sector business practices. So long as these practices do not offend the applicable laws of contract and privacy, credit checking should be recognized as a legitimate tool available to insure the investment interests of these private entities. In addition to this private business right, the Fair Credit and Reporting Act applies to such private entities, implicitly including those engaged in the provision of water utility services. Therefore, the same safeguards (referenced in footnote five) apply to the consumer being investigated.

## **D. Fee Variation under Local Laws and Ordinances**

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<sup>4</sup> See Kara A. Millonzi, *“A Guide to Billing and Collecting Public Enterprise Utility Fees for Water, Wastewater and Solid Waste Services.”* (Pg. 21). The University of North Carolina at Chapel Hill Press. (2008).

<sup>5</sup> Subsection (b), entitled “Reasonable Procedures” provides that “the purpose of this subchapter (is) to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

## **1. Division of Power Between State and Local Governments**

As noted in the paragraphs above, state law provides sufficient authority for local governments to provide water utility services. However, these local institutions are also permitted to create specific local practices by enacting ordinances and/or amending their corporate charters or by-laws. In short, the local governments are legally permitted to build further upon the foundations laid by state law.

## **2. Local Variation in Deposit, Service Activation and Late Fees**

Local governments have the right to establish specific practices to ensure the financial viability of their operations. Included within this right is the ability to divide customers in to separate classes and assess them with different amounts for any service related fees.

Likely included within the right to enact specific practices within local jurisdictions is the ability to assess different classes of customers (such as residential single-family, multi-family, renters, commercial and industrial customers).

As the various classes of customers (residential, commercial, industrial etc.) tend to incur significant differences in billable consumption, a utility may assess different fees amongst them in order to better protect the utility's investment. Although there is no specific authority concerning what constitutes a reasonable fee, such a fee should approximate the amount of risk involved with the given class of customer; to do otherwise might create an air of impropriety and unfairness under the eyes of the law.

### **a. Deposit Fees**

Most often, variations in fee assessments are exemplified through deposit fees.<sup>6</sup> Although the term “deposit” is not defined under the Official Code of Georgia, Black’s Law Dictionary (8<sup>th</sup> Ed., 2004) defines “deposit” as “money placed with a person as earnest money or security for the performance of a contract.” Applied to water utility service customers, a deposit fee thus operates to minimize the risk involved with default or non-payment for services previously rendered to a utility customer. Theoretically, then, the respective utilities must determine an amount to be charged amongst the given classes of customers that would reasonably protect the utility’s investment in the event of default.

For example, a reasonable deposit fee calculation might be the average sum of two months’ worth of services rendered to current and similarly situated customers. Regardless of the methodology used, and so long as the scheme under which such deposit fees are calculated have a rational basis and do not improperly discriminate against a protected class of individuals (such as race, gender, etc.), the Georgia courts will most likely continue to uphold the imposition of tiered deposit fees as a legitimate business practice within the water utility service industry.

#### **b. Service Activation Fees**

Less common in fee variation is the practice of having tiered service activation fees. However, if a local utility makes a rational determination that establishing service for one class of customer requires a higher fee than another class, it shall have the

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<sup>6</sup> Variations in service activation fees are also permissible, but for different reasons. Most often, setting up water and/or sewer services involve more transaction costs with commercial and industrial customers. Thus, differentiated fee schedules are just justified as having a rational basis for such differentiation. Late fees, on the other hand, do not appear to have any differentiation depending on the type of customer as such fees are usually determined by a percentage of the overdue amount on the account. If the percentages are different depending on class of customer, the practice would likely need a rational basis in relation to the business purpose for which it is implemented.

authority to do so unless prohibited by law (whether by local ordinance, enabling legislation, or provisions within the corporate charter).

Like tiered deposit fees, tiered service activation fees are theoretically based upon the concept of efficient business practices and the protection of any investment made through establishing service to a utility customer. Thus, and so long as no constitutionally protected classes of individuals are subjected to improper or blatant discrimination, tiered service activation fees shall also be considered to have a rational basis and proper place under the law.

### **c. Late Fees**

Late fees are somewhat different than deposit and service activation fees in that they are usually determined by a percentage of any delinquent amounts owed by the customer. To be effective and enforceable, however, customers must first consent to such late fee practice before they are imposed. Thus, late fee schedules should be clearly spelled out in the original contract for service.

As late fees generally bare a direct correlation to the amount of unpaid services consumed, the customer has some control on the amount of any late fees imposed upon his or her account. However, late fee practices are not generalized in Georgia since the various water service utilities are permitted to develop fee schedules tailored to fit their individual needs. Thus, the usage of tiered late fees, flat fees and/or a combination of both appears to have solid legal authority under Georgia law. If payments are made on time, however, late fees are not an issue.

## **II. Termination of Water Service Utility Accounts**

By far, the most controversial aspect of water utility service management is rooted in the practice and procedure of withholding service and terminating accounts. As the Supreme Court of Georgia once so eloquently put it:

In the absence of legislative authority, the general rule is that those furnishing the public with its water supply, either in a private or a municipal capacity, may adopt, as a reasonable regulation for conducting such business, a rule providing that the water so furnished may be cut off for nonpayment therefore, and in pursuance of such regulation the water supply may be discontinued on the failure of the consumer to pay the water rates.<sup>7</sup>

Despite the common sense logic behind this position, several questions have risen at both the state and federal level concerning what is required before service can be legally withheld and/or terminated. The following shall serve as a guide to these unique issues as addressed at the state and federal level concerning termination practices as applied in the state of Georgia.<sup>8</sup>

#### **A. Late Fees as a Predicate for Termination of Service**

Late fees are generally accepted as a legitimate practice in water utility service management. As with other fees under the law, situations have risen that question the construction and application of late fees. In *Royal v. Mayor, Etc., City of Cordele*, the Supreme Court of Georgia was called to answer the question of whether water utility

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<sup>7</sup> *Dodd v. City of Atlanta*, 154 Ga. 33, 113 S.E. 166 (Ga. 1922)

<sup>8</sup> LAW PRIMER: In addition to decisions from the Supreme Court of Georgia and the Georgia Court of Appeals, the state of Georgia is also bound to the decisions from the U.S. Court of Appeals for the 11<sup>th</sup> Circuit and those from the United States Supreme Court. The 11<sup>th</sup> Circuit is the court to which federal court decisions in Georgia, Florida and Alabama are appealed. Under the concept of Federalism, the holdings of the 11<sup>th</sup> Circuit are binding on each of these member states. Thus, decisions rendered by the 11<sup>th</sup> Circuit in cases originating from Florida and Alabama are also binding on Georgia unless a legal exception or distinction is determined to restrict such applicability. It also is important to note that Congress created the 11th Circuit Court of Appeals in October of 1981. As the Circuit was carved from the old 5<sup>th</sup> Circuit Court of Appeals, all decisions originating in the 5<sup>th</sup> Circuit prior to October 1, 1981 are considered to be binding precedent on the current 11<sup>th</sup> Circuit.

service may be terminated in absence of a late fee payment, and whether reconnection fees may be charged prior to termination of service in absence of applicable late fees.<sup>9</sup>

The operative facts in this case are that the city of Cordele, Georgia offered water services to its customers upon the agreement that the rates would be paid by the tenth of the month. The city did not have a late fee policy, but had a policy that service would be reconnected after payment of the principle amount and a reconnection fee of 50 cents. After failing to pay his bill by the tenth of the month, the city set out to terminate the plaintiff's water service. Prior to termination, the plaintiff tendered his payment, which was not accepted until he first paid the reconnection fee of 50 cents. The plaintiff filed an injunction prohibiting termination of his services. Appeals followed.

Ultimately, the Court held that “municipal corporations operating a waterworks system (...) may impose on a consumer who fails to pay by a fixed time a larger rate than is charged those who pay before that time.”<sup>10</sup> However, the Court further held “the city has no right to exact a charge for turning on water that has not been turned off.”

That said, *Royal* seems to confirm the usage of and also define the difference between late fees and reconnection fees. The Court's holding further establishes that a fee will not be considered a late fee unless it is expressly labeled and/or operates as such, and is provided for in a contractual agreement with the subject customer.

### **B. Notice of Delinquent Payment and Subsequent Termination**

Another area in which Georgia's water utility service providers appear to have considerable leeway is how they notify their customers of delinquent payments prior to termination of an account. As there appears to be no specific statutory law at the state

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<sup>9</sup> 132 Ga. 125 (1909)

<sup>10</sup> *Id.*

level addressing such pre-termination notice of delinquent accounts, these practices (if any) appear to be reserved for determination by the decision making bodies of the various water service utilities.

Pre-termination notices may be explained or described in relation to “due process,” which generally provides that no state shall deprive any person of life liberty or property without due process of law. (*See* U.S. Const. Amendment XIV.) Questions have risen under the law as to who (if anyone) is entitled to such pre-termination notice concerning their water utility service. Despite the lack of fully developed statutory law governing this topic, the applicable case law contains many decisions that are directly on point, several of which are based in concepts of property interests as guaranteed under the Constitutions of both the United States and Georgia.<sup>11</sup>

## **1. Property Interest standards under Federal Due Process Clauses**

### **a. Property Interest via Contract or Privity of Contract with Landlord**

The most recent case regarding notification of water utility service termination is *James v. City of St. Petersburg, Florida, et.al* (11<sup>th</sup> Cir. 1994).<sup>12</sup> In *James*, the 11<sup>th</sup> Circuit cited current and binding U.S. Supreme Court precedent from *Board of Regents v. Roth*, holding that:

Property interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or

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<sup>11</sup> When state cases are filed concerning questions of due process and equal protection, the federal Due Process Clause of the 14<sup>th</sup> Amendment usually applies. In pertinent part, the 14<sup>th</sup> Amendment provides that no State “shall deprive any person of life, liberty or property without due process of law.” At the state level, Article I, Section I, Paragraph I of the Georgia Constitution provides that “no person shall be deprived of life, liberty or property except by due process of law.” Although state suits may be predicated on the federal constitution, federal suits may not be solely predicated on the Georgia constitution, unless the state constitution is determined to be federally unconstitutional. Thus, selecting the proper legal vehicle on which a suit is filed is of the utmost importance in terms of maintaining a claim.

<sup>12</sup> 33 F.3d 1304 (1994)

understandings that stem from an independent source such as state laws<sup>13</sup>-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.<sup>14</sup>

The pertinent issue addressed in *James* is whether *a mere user* of water utility services has a constitutionally protected property interest in continued service, regardless of any contract between the utility and the tenant or owner of the property served.

Drawing from *Roth*, the *James* court recognized that in order to have a protected property interest, an individual “clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it. He [or she] must, instead, have a *legitimate claim of entitlement* to it.”<sup>15</sup> (*Italics added.*)

Further drawing from the principles delineated in *Roth*, the *James* court alluded to the idea that any property interest construed as an expectation in water utility services must arise from a valid and binding contract between the utility and the person claiming entitlement to such service. (Paraphrased.) In fact, the *James* court interpreted the underlying statutes upon which James based her claim to have “assume(d) a contractual relationship between either owner or tenant and the utility.”<sup>16</sup> (Tense altered for effect.)

Ultimately, and because of the lack of such a contract for service, the court found that “neither James nor her landlord complied with the City’s requirements for initiating water service.”<sup>17</sup> Thus, it was held that “James had no legitimate claim of entitlement to

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<sup>13</sup> Presumably, a state or federal statute could also provide for the necessary property interest in such expectation of continued service. The *James* Court, however, did not go so far as to make that distinction. Furthermore, state legislatures and Congress would probably refrain from making such a provision as it would place an incredibly difficult burden on a water utility service provider’s financial operations.

<sup>14</sup> Citing *Board of Regents v. Roth*, 408 U.S. 564 (1972).

<sup>15</sup> 33 F.3d 1304 (1994).

<sup>16</sup> 33 F.3d. 1304 at 1307.

<sup>17</sup> *James v. City of St. Petersburg, Florida, et.al.*, 33 F.3d at 1307 (1994).

water service under Florida law.”<sup>18</sup> As a result, the court ultimately held that James “had no protected property interest in water service under the Fourteenth Amendment’s protections of due process,” at least in terms of the 11<sup>th</sup> Circuit’s application of due process to the underlying Florida laws.<sup>19</sup>

As applied to jurisdictions in Georgia, *James* provides the framework for the idea that, in absence of an express state statute or local ordinance, any right to notification concerning the termination of water utility service must stem from a binding contract for water utility services.

### **b. Property Interest as a Right Against Constructive Eviction**

In *DiMassimo et. al. v. City of Clearwater, et. al.* (11<sup>th</sup> Cir. 1986)<sup>20</sup>, the U.S. Court of Appeals for the 11<sup>th</sup> Circuit addressed an alternative theory of a tenant’s property interest in continued water utility service. In *DiMassimo*, the plaintiff-tenants filed suit enjoining the city from shutting off their water services and further alleged that the city’s refusal to contract *directly* with the plaintiff-tenants violated their constitutional rights to due process and equal protection under the 14<sup>th</sup> Amendment.

The 11<sup>th</sup> Circuit ultimately held that: 1) *notice to tenant prior to termination of water services at landlord’s request is necessary to protect city from destroying tenant’s statutory right to seek injunction* in state court against his landlord requiring continuation of water service; 2) utility need not provide hearing before one of its employees prior to

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<sup>18</sup> *Id.* at 1307

<sup>19</sup> For good measure, the 11<sup>th</sup> Circuit cited opinions from two sister Circuit Courts of Appeal. Although not binding, such decisions do carry persuasive reason on which pending decisions may be based. In *Coghlan v. Starkey* (1988), the 5<sup>th</sup> Circuit Court of Appeals held that “there is no support for the proposition that there is a constitutional right to receive [utilities] when the applicant refuses to comply with reasonable administrative procedures.” Such administrative procedures include the formation of a contract for such services between the customer and the utility. The *James* Court also cited *Sterling v. Villiage of Maywood*, 578 F.2d 1350 (1978), in which the 7<sup>th</sup> Circuit Court of Appeals reached a similar result.

<sup>20</sup> 805 F.2d. 1536

disconnecting tenant's water service at landlord's request; 3) ordinances requiring landlord's acknowledgement of responsibility as necessary condition to inception and continuation of utilities is rationally related to asserted legitimate governmental purpose of maintaining financially stable municipal utility; and 4) landlord and tenant are so dissimilarly situated that they may be treated differently under city's ordinance. (*Italics added.*)

The operative facts that distinguish *DiMassimo* from *James* is that the *Dimassimo* plaintiffs *individually* attempted to have their water services reconnected, but were denied service because none of the plaintiffs were the owner of the property nor did any of them have the landowner's acknowledgement of responsibility as required under the city's ordinances. (In *James*, the plaintiff-tenant alleged that being a mere user of water service created a property interest in continued service regardless of any requirement of the property owner to acknowledge or contract for the tenants water utility service.)

Ultimately, the *DiMassimo* court denied the equal protection claims, holding that the city's ordinances did not improperly distinguish between potential tenants, yet distinguished between landlords and tenants, the former of whom are presumed to be the more financially stable guarantor's of the utility's investment.

Meeting alternate tests of constitutional muster, the court found that the city's ordinance requiring a landowner to either purchase water service for his tenants or offer his acknowledgement as guarantor satisfied both rational basis and intermediate scrutiny tests which respectively require that a governmental scheme must be either "rationally" or "substantially" related to an important governmental objective, that objective in

*DiMassimo* being the government’s legitimate goal of financial responsibility in the provision of water utility services.

Perhaps the most important finding from *DiMassimo*, however, concerns the concept of constructive eviction by a landlord for improperly causing his tenant’s water services to be shut off. Distinguishing *James*, the *DiMassimo* court’s decision provided that such a right against constructive eviction was a sufficient property interest protected under the 14<sup>th</sup> Amendment. Thus, the court ultimately held that the Florida statutes clearly prohibited a landlord from wrongfully evicting his tenants by methods such as intentionally depriving them of water. Based upon this principle, the court had no trouble in finding that “a pre-termination notice to the tenant is necessary to prevent the City from destroying rights granted in him by state law.”<sup>21</sup>

In other words, when a landlord unilaterally attempts to have his tenants’ water services cut off, said tenants must be afforded pre-termination notice so that they may exercise their protected property interests against constructive eviction by filing an injunction in state court against any unwarranted termination of service.

## **2. Application of *DiMassimo* to Georgia**

In consideration of *DiMassimo*, however, similar substantive statutes would need to exist under Georgia law to argue that the 11<sup>th</sup> Circuit’s findings in *DiMassimo* are binding in Georgia under the 14<sup>th</sup> Amendment. That said, it appears that O.C.G.A. §44-7-14.1, pertaining to the “unlawful suspension of utility services prior to final dispossession” provides the legal foundation on which *DiMassimo* could be applied in Georgia.

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<sup>21</sup> 805 F.2d 1536, 1540 (11<sup>th</sup> Cir. 1986).

In pertinent part, §44-7-14.1 provides that:

- (a) As used in this Code section, the term “utilities” means heat, light, and water service.
- (b) It shall be unlawful for any landlord knowingly and willfully to suspend the furnishing of utilities to a tenant until after the final disposition of any dispossessory proceeding by the landlord against such tenant.
- (c) Any person who violates subsection (b) of this Code section shall, upon conviction, be assessed a fine not to exceed \$500.00.

Here, the language of subsection (b) seems to suggest that a right against constructive eviction is implicitly acknowledged by the Georgia General Assembly, thereby making the legal application of *DiMassimo* applicable in the Georgia courts.

### **B. Lien Attachment in connection with Termination of Service**

When outstanding bills go unpaid and termination is effected, the historical practice in Georgia was to file for a lien against the property (not persons) at which delinquent accounts remained. As more fully explained below, however, the law of lien attachment against real property for outstanding balances has undergone a great deal of statutory change in Georgia.

That said, the statute effectuating such change does not appear to wholly alter the applicable case doctrine since it only affects a given class of customers (single and multi-family residential family users). Theoretically then, the unaffected customers are still subject to the common law’s guidance to the extent it still applies.

#### **1. Regime Change: Single and Multi-Family Residential Use Properties**

On March 23, 2009, the Supreme Court of Georgia handed down its opinion in *Federal Home Loan Mortgage Corporation (Freddie Mac) v. City of Atlanta*, 285 Ga. 189 (2009), which solidified a regime change in debt collection practices amongst Georgia’s various water utility service providers.

In a case originating from an injunctive relief and declaratory judgment action regarding the supply of water services to a piece of property held by the Plaintiff, the U.S. District Court for the Northern District of Georgia certified important questions of state law to the Supreme Court of Georgia to determine whether:

- 1) The City of Atlanta's ordinance concerning action that may be taken (i.e. refusing water supply because of indebtedness of prior owner, occupant or tenant) when charges for water and sewer service are not paid is inconsistent with and thus pre-empted by [OCGA § 36-60-17](#), and
- 2) Whether [OCGA § 36-60-17](#) prohibits a municipality from retaining, as well as imposing, a lien on residential property to secure unpaid charges for water service to the residential property when the property is no longer owned by the person who incurred the charges.

In a unanimous opinion, all justices concurred in holding that “to the extent the city ordinance authorizes the water supplier to discontinue service *to the residential unit served by its own meter* for unpaid water charges incurred by a former owner, occupant, or lessee of the property:”<sup>22</sup> (*Italics added.*)

- 1) The city ordinance concerning action water supplier may take when charges for water and sewer service were not paid was pre-empted by state statute which prohibited water supplier from refusing to supply water because of indebtedness of prior owner, occupant or lessee of residence, and
- 2) The city ordinance enacting a lien upon property where bill or charge was incurred upon owner's failure to pay water bill was not pre-empted by state statute.<sup>23</sup>

Perhaps the most important portion of this opinion rests in its qualifying language, which suggests that having an individual meter is outcome-determinative in terms of any

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<sup>22</sup> 205 Ga. 189 at 193 (2009).

<sup>23</sup> Quoting the Court's syllabus opinion, 205 Ga. 189 at 191 (2009).

substantive rights guaranteed through the governing statute.

**a. Discussion:**

**i. Residential Properties Served by an Individual Meter**

Prior to providing its reasoning behind the above holding in *Freddie Mac*, the Court first addressed the fact that O.C.G.A. 36-60-17 was enacted in direct response to a long line of cases ranging from 1892 to 1993<sup>24</sup> which collectively provided that “because of the heightened status given (to) water liens, (the) Georgia appellate courts (have) ruled that unpaid water charges incurred by a previous owner *or occupant* survived foreclosure and became the obligation of the lender which foreclosed upon the delinquent owner.”<sup>25</sup> (*Italics and Parenthesis added*).

In short, the pre-*Freddie Mac* cases ultimately supported the idea that liens for unpaid water services may have legally attached to the property itself (not to the person incurring the indebtedness) and were therefore not subject to the same notice and recording provisions under OCGA as required with other liens against real property.

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<sup>24</sup> See *City of Atlanta v. Burton*, 90 Ga. 486, 489, 16 S.E. 214 (1892) (approving water liens against real property to secure payment of unpaid bills for water supplied to the property where a city charter or local ordinance authorized the water supplier to shut off water to the property for failure to pay the water bill and required that the water service not be restored until the arrears were fully paid); *Dodd v. City of Atlanta*, 154 Ga. 33, 39, 113 S.E. 166 (1922) (noting the city's ability to enforce the collection of costs related to water service by execution, levy and sale of the property served); *Bowery Savings Bank v. DeKalb County*, 240 Ga. 528, 530-531, 242 S.E.2d 50 (1978), (viewing the creation of such a water lien as the exercise of the police power and that liens for unpaid water charges “have the same priority as liens for ad valorem taxes” and “were not extinguished by the banks' foreclosures of their security deeds...”); See *Atlanta Title & Trust Co. v. Inman*, 42 Ga.App. 191, 155 S.E. 364 (1930) (lien for tax imposed by municipality attached to property despite not having been recorded in superior court clerk's office); *Union Circulation Co. v. Russell*, 463 F.Supp. 884 (N.D.Ga.1978) (county ordinance authorizing withholding of water services from landlord's property where former tenant had incurred delinquent water bills does not violate due process of law or equal protection where there is an ordinance that expressly creates liens on property at which there is an unpaid water bill); Cf. *Chatham v. Jackson*, 613 F.2d 73 (5th Cir.1980) (in light of holding in *Bowery Savings Bank* concerning the priority of lien based on unpaid water bill, an ordinance authorizing withholding of water services until delinquent bill satisfied is not an unconstitutional “taking,” and does not violate due process and equal protection); and *Druid Associates, Ltd. v. National Income Realty Trust*, 210 Ga.App. 684 (1993) (holding that the foreclosing holder of a deed to secure debt was responsible for the delinquent water charges incurred by the tenant of the property owner suffering foreclosure).

<sup>25</sup> Summary analysis by the Court, *Freddie Mac v. City of Atlanta*, 285 Ga. at 192.

As referenced in footnote twenty-one, *infra*, the last case in this formative line of decisional authority was *Druid Assoc. v. National Income Reality Trust* (1993). Six months after the decision in *Druid Associates*, the Georgia General Assembly enacted [OCGA § 36-60-17](#), which provided in pertinent part that:

(a) No public or private water supplier shall refuse to supply water to any single or multifamily residential property to which water has been furnished through the use of a separate water meter for each residential unit on application of the owner or new resident tenant of the premises because of the indebtedness of a prior owner, prior occupant, or prior lessee to the water supplier for water previously furnished to such premises. (Italics and emphasis added.)

(b) For each new or current account to supply water to any premises or property, the public or private water supplier shall maintain a record of identifying information on the user of the water service and shall seek reimbursement of unpaid charges for water service furnished initially from the person who incurred the charges.

(c) A public or private water supplier shall not impose a lien against real property to secure unpaid charges for water furnished unless the owner of such real property is the person who incurred the charges. (Italics and underlining added.)

To be clear, the ensuing statute only modifies the prior case law as it pertains to single and multifamily residential properties that are served by an individual water meter. For all other properties, however, the regime of refusing water utility service appears to remain as it appeared under the common law predating the statute, the rights in which requires a separate analysis under the law.

## **ii. Residential Properties not served by an Individual Meter**

In light of *Freddie Mac*, the Supreme Court of Georgia seems to have expressly reserved the right for a water utility service provider to refuse water service to current owners of premises wherein delinquent balances are owed by prior owners, occupants or

lessees at residential properties not served by their own service meter.

From a policy perspective, the logic seemingly rests in the idea that the utilities would have no recourse against the prior owner, occupant or lessee due to the fact that shared meters cause for an inability to account for the exact delinquent amount at a given unit in question.

If true, this is particularly damaging for current owners of residential properties not having individual meters in each unit. Under the logical application of the law, these owners would seemingly be required to pay the delinquent accounts of prior occupants, owners and tenants before water utility services may be restored to the premises in question. Thus, prospective buyers should be very careful in the purchase of property not served by an individual meter wherein large delinquent balances may exist; otherwise, the purchaser may inherit a property at which service may be refused until delinquent accounts are paid by the current owner.

Concerning liens that may be filed against properties without individual meters, the statute remains unchanged in that liens may only be attached to property for delinquent accounts incurred by owners of the property. Thus, the subsequent purchase of such property should also be diligently checked to see if such a lien has already attached (or faces attachment prior to purchase) due to the delinquent balances of a prior owner. Ultimately, purchasing property subject to a lien is likely not in the best interest of prospective purchasers.

### **iii. Commercial and Industrial Properties**

Under OCGA 36-60-17, questions remain as to how commercial and industrial properties are affected by the statute. However, the court in *Freddie Mac* expressly held

that the statute was merely a limited legislative modification of the prior case law whereby the “General Assembly statutorily overruled the case law governing imposition of “heightened status” liens for unpaid water charges incurred by former non-owner occupants” on residential properties not served by an individual meter. Thus, it appears that commercial and industrial properties are protected from lien imposition, but not necessarily from the refusal to provide water services until prior delinquent accounts are paid.

## **2. Residual Effect of Regime Change: Lien as Necessary Basis for Refusal of Service**

Considering *Freddie Mac* and its predicate statute [O.C.G.A. 36-60-17(a)], there still appears to be authority under Georgia case law suggesting that liens may be imposed on residential/single family residences not served by their own meter and all other properties wherein the delinquent balance was incurred by the owner of the property.<sup>26</sup> However, these liens must be expressly created by statute, ordinance, or other rules since the courts have rejected an implied lien theory.<sup>27</sup> When such liens are properly attached, it appears to be wholly legal for a water utility service provider to refuse service to subsequent purchasers until the lien for delinquent accounts is satisfied.

## **X. Conclusion**

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<sup>26</sup> See *Metro Properties v. City of Dalton*, 161 Ga. App. 711, *cert. denied*. (1982), holding that the city of Dalton’s local laws and ordinances did not properly provide for the creation of such a lien, thereby circumventing any authority by the city to withhold service to a property based upon a prior delinquent account.

<sup>27</sup> In *Metro Properties v. City of Dalton* (1982), the Georgia Court of Appeals held that the “city could not refuse to supply (water) utility service to a building until previous tenant’s delinquent account had been paid *where no valid lien for delinquent amounts was expressly created by statute, ordinance or rules*.”<sup>27</sup> The logical reverse of this language seems to suggest that, while considering the protections of *Freddie Mac*, where a valid lien is provided by law, a city *may* refuse service for until a previous tenant’s delinquent accounts have been paid.

It is well rooted in Georgia law that local governments have the authority to create and implement water utility services within their particular jurisdictions. The trend is also evident that water utility service providers enjoy the right to conduct their business practices as needed to protect and ensure the financial viability of their operations, so long as the practices satisfy federal, state and local regulatory and legal doctrines.

To ensure the protections currently enjoyed by the water utility service industry, service providers and operators would be well advised to continue managing their utility operations with reason, fairness and responsibility in connection to the financial practices associated therewith. So long as no constitutionally protected classes of individuals are improperly subject to discrimination through such practices, these principles should be satisfied with relative ease.

At the end of the day, water and wastewater services have long been and continue to be an important part of every day life for most Georgians. As societies therein simply cannot survive without each, the need to ensure their continued financial viability and sustained functional operations is nothing short of a necessity to the public served.

***For more information on actual water/wastewater rates in Georgia, please see:  
<http://efc.unc.edu/ga/rates.html>***