

CPLR 202: Significant Contacts Test Extended to Breach of Warranty Claims for Purpose of Borrowing Statute

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precedents. In *Micallef v. Miehle Co.*, the Court discarded the patent danger rule in suits for negligent design of machinery, establishing in its place a rule of reasonable care. In so doing, the Court ended the twenty-six year hegemony of *Campo v. Scofield*. With its discussion of *People v. Hobson*, *The Survey* continues its recent expansion into the area of criminal procedure. The *Hobson* Court reaffirmed earlier cases holding that when an attorney has entered the case, a criminal defendant may not waive his right to counsel unless his attorney is present. This decision largely discredits the apparent rejection of the *Donovan-Arthur* rule in *People v. Robles*.

Several noteworthy lower court decisions are also considered. In *Martin v. Julius Dierck Equipment Co.*, the Appellate Division, Second Department, held that for statute of limitations purposes under New York's borrowing statute, a warranty cause of action accrues in the jurisdiction with the most significant contacts to the issues, rather than necessarily accruing at the place of sale.

In another significant decision, *Green v. Bender*, the Supreme Court, Westchester County, held that a *Seider*-predicated third party defendant may seek *Dole* apportionment without subjecting himself to in personam jurisdiction. Finally, this issue of *The Survey* deals with the long-awaited liberalization of the notice of claim requirements under section 50-e of the General Municipal Law. This broad amendment to the statute is critically analyzed. Through our discussion of these and other subjects, we hope to serve the practitioner by keeping him abreast of significant new developments in New York law.

ARTICLE 2—LIMITATIONS OF TIME

CPLR 202: Significant contacts test extended to breach of warranty claims for purposes of borrowing statute.

Popularly known as the borrowing statute, CPLR 202 provides that when a cause of action accrues outside the state in favor of a nonresident plaintiff, its commencement must be timely under both New York law and the law of the jurisdiction where it "accrued."¹

1960 N.Y. LEG. DOC. No. 80 FOURTH REP.
 1961 FINAL REPORT OF THE ADVISORY COMMITTEE
 ON PRACTICE AND PROCEDURE FINAL REP.
 Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committee:
 1961 N.Y. LEG. DOC. No. 15 FIFTH REP.
 1962 N.Y. LEG. DOC. No. 8 SIXTH REP.
¹ CPLR 202 provides:

The test for determining the place of accrual has traditionally been a rather mechanical one, whereby the court seeks to determine the place of the wrong and deems the action to have accrued there for borrowing statute purposes.² By contrast, the Court of Appeals, in the landmark decisions of *Auten v. Auten*³ and *Babcock v. Jackson*,⁴ rejected a similarly mechanical "place of accrual" test for conflict of laws purposes, opting instead for a "grouping of contacts" or "center of gravity" approach to determine which state's substantive law should be applied.⁵ Until recently, however, these decisions have had no effect on the borrowing statute.⁶ Indeed, the decision of the Appellate Division, First Department, in *Myers v. Dunlop Tire & Rubber Corp.*⁷ illustrates the continuing vitality of the mechanical approach to the borrowing statute. The *Myers* court held that a negligence cause of action accrued in the state where the injury was sustained by the nonresident plaintiff, while a breach of warranty action arising from the same occurrence accrued in the state where the sale was consummated.⁸

An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

Thus, New York is said to "borrow" the statute of limitations of the foreign jurisdiction where the cause of action accrued.

² See, e.g., *Smalley v. Hutcheon*, 296 N.Y. 68, 70 N.E.2d 161 (1946); *Apton v. Barclays Bank, Ltd.*, 274 App. Div. 935, 83 N.Y.S.2d 488 (2d Dep't 1948) (mem.), *appeal denied*, 274 App. Div. 1065, 86 N.Y.S.2d 288 (2d Dep't 1949).

³ 308 N.Y. 155, 124 N.E.2d 99 (1954).

⁴ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). For divergent views on the wisdom of *Babcock*, see *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

⁵ These tests reject the older rule that the law of the place of the wrong, *lex loci delicti*, should invariably govern the case, and instead apply the law of the jurisdiction with the greatest interest in the matter. The *Auten* Court reasoned that these tests will allow "the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation.'" 308 N.Y. at 161, 124 N.E.2d at 102, *quoting Note, Choice of Law Problems in Direct Actions Against Indemnification Insurers*, 3 UTAH L. REV. 490, 498-99 (1953). A discussion of the various interests to be weighed in such tests is provided in *Comment, Choice of Law and the New York Borrowing Statute: A Conflict of Rationales*, 35 ALB. L. REV. 754 (1971).

⁶ Thus, as was noted by the United States Court of Appeals for the Second Circuit in *George v. Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964), New York courts could conceivably find a cause of action to accrue for borrowing statute purposes in one state, while determining substantive liability under the law of another state. 332 F.2d at 78.

⁷ 40 App. Div. 2d 599, 335 N.Y.S.2d 961 (1st Dep't), *modifying mem.* 69 Misc. 2d 729, 330 N.Y.S.2d 461 (Sup. Ct. N.Y. County 1972).

⁸ In *Myers*, a Kentucky plaintiff was injured in Kentucky by an exploding tire which had been purchased by his employer "f.o.b. Buffalo." The first department found the negligence

Recently, in *Martin v. Julius Dierck Equipment Co.*,⁹ the Appellate Division, Second Department, ruled that when a breach of warranty claim by a nonresident plaintiff is joined with a claim in negligence, the court must first decide whether the action sounds "essentially" in tort or contract, and the cause of action should then be deemed to accrue in the jurisdiction which has the most significant contacts with the essential issues.¹⁰ Thus, the panel extended the more liberal conflicts test to the traditionally more restrictive domain of the borrowing statute.¹¹

The *Martin* plaintiff was injured in Virginia by a malfunctioning forklift truck. Asserting one cause of action in negligence and two in breach of warranty, he sued the manufacturer and the sales distributor, both of which were New York corporations. Following *Myers*, the Supreme Court, Queens County, found that while the negligence claim accrued in Virginia and was barred by the Virginia statute of limitations,¹² the warranty claims accrued in New York and were timely under the longer New York limitation period.¹³ The decision was appealed to the second department.

Justice Titone, writing for four members of the appellate panel,¹⁴ rejected the "fragmentation" of the complaint and held that where the breach of warranty and negligence claims arise from the same transaction, a court should initially determine the "underlying nature of plaintiff's action and then decide which [jurisdiction] has the primary interest in the matters in dispute."¹⁵ In this case, since plaintiff was essentially seeking damages for personal injuries, the action was found to be tortious in nature. Thus, the court held that Virginia had the most significant contacts with the matter because it was the state of the forklift's consignment and use, as well as the locus of plaintiff's injury. Had the traditional, mechanical accrual test been applied, however, the result would have been identical to that in *Myers*. Instead the court extended the *Auten-Babcock* conflicts test to the borrowing statute. Consequently, both

claim to have accrued in Kentucky and the breach of warranty claim to have accrued in New York. 40 App. Div. 2d at 599, 335 N.Y.S.2d at 961.

⁹ 52 App. Div. 2d 463, 384 N.Y.S.2d 479 (2d Dep't 1976).

¹⁰ *Id.* at 466, 384 N.Y.S.2d at 482.

¹¹ In so doing, the panel acknowledged the conflict with *Myers*. *Id.*

¹² VA. CODE ANN. § 8-24 (Supp. 1976) provides a two-year statute of limitations in personal injury actions.

¹³ N.Y.U.C.C. § 2-725(1) (McKinney 1964) provides a four-year statute of limitations in breach of warranty actions.

¹⁴ Acting Presiding Justice Hopkins and Justices Cohalan and Christ joined in the opinion; Justice Damiani dissented without opinion.

¹⁵ 52 App. Div. 2d at 466, 384 N.Y.S.2d at 482.

the negligence and the breach of warranty claims were found to accrue in Virginia and were subject to that state's statute of limitations, under which they were time barred.¹⁶

The Court of Appeals has never determined where a third party's warranty cause of action accrues for the purpose of the borrowing statute.¹⁷ Concededly, there is an appealing logic to the *Myers* holding that the time of accrual for the purpose of the statute of limitations¹⁸ determines the place of accrual for the purpose of the borrowing statute.¹⁹ In addition, there is little doubt that the mechanical accrual test utilized by the *Myers* court is the formula traditionally applied to the borrowing statute.²⁰ Indeed, the United States Court of Appeals for the Second Circuit, although labeling this approach "rather simplistic," has declared that it continues to be the law of the New York courts despite the "sophisticated teachings" of *Babcock*.²¹

¹⁶ Virginia case law has held that a breach of warranty claim which seeks recovery for personal injuries should be governed by the two-year personal injury statute of limitations. See *Campbell v. Colt Indus., Inc.*, 349 F. Supp. 166 (W.D. Va. 1972), discussed in 59 VA. L. REV. 1590, 1613-15 (1973); *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 168 S.E.2d 257 (1969); *Friedman v. Peoples Serv. Drug Stores, Inc.*, 208 Va. 700, 160 S.E.2d 563 (1968).

¹⁷ This is perhaps one area in which products liability has outrun choice of law development. The extension of a cause of action based upon breach of warranty to a third party not in privity on the original contract has posed a new problem. It is problematical to say that a third party's cause of action accrued in the forum of the sale, since he acquired no right to sue on the contract until he was injured. Thus, even under the old rule that a cause of action accrues in "the state where the last event necessary to make an actor liable . . . takes place," RESTATEMENT OF CONFLICT OF LAWS § 377 (1934), the locus of the third party's injury logically appears to be the place where *his* cause of action accrues.

¹⁸ At common law, a breach of warranty action accrued at the time of the sale. *Allen v. Todd*, 6 Lans. 222 (Gen. T. 4th Dep't 1872). Under the Uniform Commercial Code, the breach occurs when tender of delivery is made. N.Y.U.C.C. § 2-725(2) (McKinney 1964).

¹⁹ The full development of this point is found in the supreme court's opinion in *Myers*. See 69 Misc. 2d at 731-32, 330 N.Y.S.2d at 464. The Appellate Division, First Department, summarily affirmed this portion of the lower court's determination. There is, however, a problem with the authority used by the supreme court in reaching this result. The court relied upon a quotation from the opinion of Judge Cardozo in *Standard Casing Co. v. California Casing Co.*, 233 N.Y. 413, 418, 135 N.E. 834, 835 (1922), which read:

The undertaking was merely that [the goods] would be delivered to the carrier. The place where that was to be done, as it would be the place of final performance by the seller if the contract had been kept, must be the place also of default when performance was refused.

Omitted in *Myers* was the next sentence: "Market values in California, and not market values in New York, must, therefore, be the measure of the value of the bargain." *Id.* (citation omitted). The *Myers* court, therefore, apparently reasoned that because the time of the breach determined the place of the breach for the purpose of measuring damages, it should also determine the place of the breach for application of the borrowing statute. See 69 Misc. 2d at 731-32, 330 N.Y.S.2d at 463.

²⁰ See note 2 and accompanying text *supra*.

²¹ *Sack v. Low*, 478 F.2d 360, 367 (2d Cir. 1973).

Moreover, the *Martin* holding seems too unclear to be a viable alternative. The court appears to treat plaintiff's complaint as embodying, in effect, one cause of action, rather than consisting of three independent theories of liability.²² By finding this single action to be "essentially tortious" and applying to it the grouping of contacts test, the court seems to have deprived the two warranty claims of independent consideration. If this is in fact the approach followed in *Martin*, the second department has embarked on a questionable course, since the Court of Appeals has consistently recognized the validity of a separate warranty action in the products liability area.²³

It is submitted, however, that the *Martin* holding can be supported by a different rationale. Indeed, the *Martin* panel may actually have intended to find that there was a distinct warranty action and then to use it as a basis for extending the grouping of contacts test to the borrowing statute. Such an approach is in accord with the modern trend in conflict of laws thinking. The *Restatement*, without distinguishing between tort and contract, has endorsed application of the law of the state "which . . . has the most significant relationship to the occurrence and the parties . . ."²⁴ In *Martin*, the interest of Virginia, the site of the forklift's exclusive use and of plaintiff's injury, was held to outweigh that of New York, the site of the sale.²⁵ It is appropriate to conclude, there-

²² The court stated: "With respect to the essence or underlying nature of *this* action, we believe it to be tortious in concept, notwithstanding that two of the three causes of action are for breach of warranty." 52 App. Div. 2d at 466, 384 N.Y.S.2d at 482 (emphasis added).

²³ Since *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), discussed in *The Survey*, 48 St. JOHN'S L. REV. 611, 616 (1974), and *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), discussed in *The Survey*, 50 St. JOHN'S L. REV. 179, 182 (1975), New York has recognized three distinct theories of liability in products safety cases: negligence, strict products liability, and warranty, both implied and express. The language of the *Martin* opinion seems to deny the separate identity of the warranty action in deeming the entirety of plaintiff's claims "essentially tortious." Indeed, it is highly unusual that the tortious nature of a third party's warranty action be emphasized for the purpose of *limiting* liability. Previously, recognition of the tortious nature of a warranty claim has been used to *extend* liability to minor children of the buyer's family, *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961), an injured user, *Goldberg v. Kollman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), an injured rescuer, *Guarino v. Mine Safety Appliance Co.*, 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969), and injured bystanders, *Ciampichini v. Ring Bros., Inc.*, 40 App. Div. 2d 289, 339 N.Y.S.2d 716 (4th Dep't 1973).

²⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (torts); *id.* § 188(1) (contracts) (1971).

²⁵ New York's interest was found to be "dormant and transitory" and limited to the period during which the forklift was awaiting shipment to Virginia. 52 App. Div. 2d at 467, 384 N.Y.S.2d at 483.

fore, that the *Martin* plaintiff's warranty action, like his negligence claim, accrued in Virginia for borrowing statute purposes.

Notably, such an approach furthers the threefold objective of the borrowing statute. CPLR 202 was intended to mitigate the effects of section 207, the "tolling statute,"²⁶ prevent forum shopping by nonresident plaintiffs,²⁷ and provide the shortest possible period of limitations for resident defendants.²⁸ The mechanical *Myers* holding defeats the latter two of these objectives by allowing a nonresident plaintiff, time barred in the jurisdiction with the most significant contacts to the action, to bring it in New York and avail himself of a longer statute of limitations, even if New York's connection with the issue is tenuous.²⁹ A grouping of contacts application would afford the court a degree of discretion in choice of law, enabling it to fully effectuate the objectives of the borrowing statute by frustrating a forum shopping plaintiff as well as affording a resident defendant the benefit of a shorter period of limitations.³⁰

This conflict between the departments must eventually be resolved by the Court of Appeals. Given the developing trends discussed above, as well as the Court's flexible attitude toward the kindred doctrine of *forum non conveniens*,³¹ it is likely that the

²⁶ CPLR 207(1) provides in pertinent part: "If, when a cause of action accrues against a person, he is without the state, the time within which the action must be commenced shall be computed from the time he comes into or returns to the state." For a discussion of the relationship between CPLR 202 and CPLR 207, see 1 WK&M ¶ 202.01.

²⁷ See *George v. Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir.), cert. denied, 379 U.S. 904 (1964); *Daigle v. Leavitt*, 54 Misc. 2d 651, 283 N.Y.S.2d 328 (Sup. Ct. Rockland County 1967). See generally CPLR 202, commentary at 81 (McKinney 1972). See also Ester, *Borrowing Statutes of Limitations and Conflict of Laws*, 15 U. FLA. L. REV. 33 (1962).

²⁸ See *Fullmer v. Sloan's Sporting Goods Co.*, 277 F. Supp. 995 (S.D.N.Y. 1967); *Charterner v. Kice*, 270 F. Supp. 432 (E.D.N.Y. 1967); *Baker v. Cohn*, 266 App. Div. 236, 41 N.Y.S.2d 765 (1st Dep't 1943); *Daigle v. Leavitt*, 54 Misc. 2d 651, 283 N.Y.S.2d 328 (Sup. Ct. Rockland County 1967).

²⁹ See *Gegan, Where Does a Personal Injury Action Accrue Under the New York Borrowing Statute*, 47 ST. JOHN'S L. REV. 62, 66 (1972).

³⁰ The *Martin* court declared:

In arriving at this conclusion, we also take cognizance of the fact that we are giving effect to the primary purposes of the "borrowing" statute, which are to prevent "forum shopping" by nonresident plaintiffs . . . and also to give resident defendants the benefit of the shortest period of limitations

52 App. Div. 2d at 468, 384 N.Y.S.2d at 483 (citations omitted).

³¹ With its decisions in *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 609-12 (1972), codified in CPLR 327, and *Martin v. Mieth*, 35 N.Y.2d 414, 321 N.E.2d 777, 362 N.Y.S.2d 853 (1974), the Court of Appeals moved towards recognizing that all significant factors in an individual case should be considered in finding the appropriate forum for the dispute. Lower courts have interpreted these decisions as encouraging a liberal approach. See, e.g., *Pollack v. Cooley*, 175 N.Y.L.J. 61, March 30, 1976, at 10, col. 4 (Sup. Ct. Nassau County); *Vath v. Israel*, 80 Misc. 2d 759, 364 N.Y.S.2d 97 (Sup. Ct. Queens County 1975).

Court will opt for an outright application of the grouping of contacts test to the borrowing statute. It is to be hoped that the Court's resolution of this conflict will be free of both the mechanical approach of *Myers* and the ambiguous reasoning of *Martin*.

CPLR 214(5): Three-year statute of limitations applied to action for abuse of process.

Article 2 of the CPLR contains detailed provisions indicating the appropriate statute of limitations applicable to a cause of action in New York. None of these provisions, however, expressly declares which statute of limitations governs an action for abuse of process.³² CPLR 215(3) provides a one-year limitation period for actions based on the intentional torts of assault, battery, false imprisonment, malicious prosecution, defamation, or invasion of privacy.³³ Section 214(5) applies a three-year statute of limitations to any "action to recover damages for a personal injury except as provided in section 215."³⁴ Finally, CPLR 213(1) requires that actions "for which no limitation is specifically prescribed by law" be brought within six years from the accrual of the cause of action.³⁵ Recently, in *Levine v. Sherman*,³⁶ the Supreme Court, Nassau County, in a case of first impression, held that although abuse of process is an intentional tort which would logically fit most neatly among those actions listed in 215(3), the language of the CPLR mandates application of the three-year statute of limitations provided in CPLR 214(5).³⁷

³² Abuse of process is "the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process." *Board of Educ. v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 400, 343 N.E.2d 278, 280, 380 N.Y.S.2d 635, 639 (1975); *accord*, *Hauser v. Bartow*, 273 N.Y. 370, 373, 7 N.E.2d 268, 269 (1937); *Dean v. Kochendorfer*, 237 N.Y. 384, 390, 143 N.E. 229, 231 (1924); *Carver Fed. Sav. & Loan Ass'n v. Williams*, 47 App. Div. 2d 834, 835, 365 N.Y.S.2d 563, 566 (2d Dep't 1975). For a discussion of the elements of an action for abuse of process, see note 50 *infra*.

³³ CPLR 215(3) states that a one-year limitation period will be applied to an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law

³⁴ CPLR 214(5).

³⁵ CPLR 213(1). The "usual application [of CPLR 213(1)] is to actions in which equitable relief is sought." 1 WK&M ¶ 213.01 (footnote omitted); see *Ford v. Clendenin*, 215 N.Y. 10, 16, 109 N.E. 124, 126 (1915) (applies to any and every form of equitable action); *Beresovski v. Warszawski*, 28 N.Y.2d 419, 423-25 & n.2, 271 N.E.2d 520, 522-23 & n.2, 322 N.Y.S.2d 673, 675-76 & n.2 (1971) (applies to equitable remedy of specific performance).

³⁶ 86 Misc. 2d 997, 384 N.Y.S.2d 685 (Sup. Ct. Nassau County 1976).

³⁷ *Id.* at 999, 384 N.Y.S.2d at 687. Coincidentally, 10 days after this statute of limitations issue was decided by the *Levine* court as one of first impression, the Supreme Court, New York County, was presented with the same issue in *Brecker v. Groosman*, 175 N.Y.L.J. 123, June 25, 1976, at 6, col. 4 (Sup. Ct. N.Y. County June 24, 1976). The *Brecker* court, after