

# CPLR 214: Adoption of Tort Statute of Limitations and Time of Accrual for Strict Products Liability

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## ARTICLE 2 — LIMITATIONS OF TIME

*CPLR 214: Adoption of tort statute of limitations and time of accrual for strict products liability.*

The tortuous development of strict products liability<sup>1</sup> as an independent cause of action<sup>2</sup> remedying injury caused by defectively manufactured products<sup>3</sup> has led to both confusion<sup>4</sup> and anomaly.<sup>5</sup>

<sup>1</sup> See, e.g., *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring); *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). See also *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); *Randy Knitwear v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); *Goldberg v. Kollman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* (1965). But see *Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 & n.4 (1972).

<sup>3</sup> See generally *Murphy, New Directions in Products Liability*, 612 INS. L.J. 40 (1974) [hereinafter cited as *Murphy*]; *Noel, Manufacturers of Products — The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); *Prosser, Products Liability in Perspective*, 5 GONZAGA L. REV. 157 (1970); *Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960); *Prosser, The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); *Wade, On the Nature of Strict Tort Liability for Products*, 612 INS. L.J. 141 (1974); *Wade, Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916 (1964); Comment, *The Last Vestige of the Citadel*, 2 HOFSTRA L. REV. 721 (1974); *The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974).

<sup>4</sup> See, e.g., *Lewis v. John Royal & Sons*, 79 Misc. 2d 304, 357 N.Y.S.2d 601 (Sup. Ct. Broome County), *aff'd*, 46 App. Div. 2d 304, 362 N.Y.S.2d 262 (3d Dep't 1974) (contract rules applied to a "tort claim"), discussed in *The Survey*, 49 ST. JOHN'S L. REV. 576, 578 (1975); *Ciampichini v. Ring Bros.*, 40 App. Div. 2d 289, 339 N.Y.S.2d 716 (4th Dep't 1973) (tort rules applied to what court called breach of warranty or strict tort liability).

Much of this confusion has stemmed from *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969) (4-3 decision), wherein the Court stated that strict liability in tort and implied warranty, absent privity, are actually the same cause of action. *Id.* at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494. See 7B MCKINNEY'S CPLR 214, commentary at 429-30 (1972) (equating strict liability in tort with breach of implied warranties is merely "an artificial attempt to squeeze warranty [theory] into a contract mold despite the absence of privity"); 1 WK&M ¶ 214.13; Note, *Manufacturer's Strict Tort Liability to Consumers for Economic Loss*, 41 ST. JOHN'S L. REV. 401, 403 (1967) (strict liability in tort must be recognized in place of the fictional implied warranty based on personal injury); *The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974).

<sup>5</sup> See 7B MCKINNEY'S CPLR 214, commentary at 429-30 (1972); *Siegel, Procedure Catches Up — And Makes Trouble*, 45 ST. JOHN'S L. REV. 63, 66 (1970) [hereinafter cited as *Siegel*] (*Mendel* departs from Court's own charted path of easing plaintiff's recovery by holding his action time barred by contract statute of limitations).

In addition, the retailer or wholesaler, often an innocent intermediary, may find himself liable to the consumer but without further recourse to the manufacturer if the contract time of accrual and statute of limitations are applied to and time-bar his action. See *Caruloff v. Emerson Radio & Phonograph Corp.*, 445 F.2d 873 (2d Cir. 1971), *aff'g* 314 F. Supp. 631 (S.D.N.Y. 1970), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 565 (1972); *Ibach v. Grant Donaldson Serv., Inc.*, 38 App. Div. 2d 39, 326 N.Y.S.2d 720 (4th Dep't 1971), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 768, 772 (1972); *C.K.S., Inc. v. Helen Borgenicht Sportswear, Inc.*, 22 App. Div. 2d 650, 253 N.Y.S.2d 56 (1st Dep't 1964) (*per curiam*), discussed in *The Quarterly Survey*, 46 ST. JOHN'S L. REV. 561, 565 (1972); *Murray, Random Thoughts on Mendel*, 45 ST. JOHN'S L. REV. 86, 89-90 (1970); *Siegel, supra*, at 69-70.

Particularly problematic has been the determination of an appropriate statute of limitations and time of accrual.<sup>6</sup> In *Victorson v. Bock Laundry Machine Co.*,<sup>7</sup> a consolidation of personal injury and property damage actions brought against a manufacturer of products claimed defective by remote users, the New York Court of Appeals resolved that the applicable statute of limitations under the theory of strict products liability is the three-year tort statute of limitations<sup>8</sup> and that such period does not begin to run until the injury is sustained.<sup>9</sup> In so holding, the Court expressly overruled its previous decision to the contrary in *Mendel v. Pittsburgh Plate Glass Co.*,<sup>10</sup>

<sup>6</sup> See generally W. PROSSER, LAW OF TORTS § 95, at 634-35 (4th ed. 1971) [hereinafter cited as PROSSER]; RESTATEMENT (SECOND) OF TORTS § 402A, comment *b* (1965).

<sup>7</sup> 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), *aff'g* 44 App. Div. 2d 702, 355 N.Y.S.2d 565 (2d Dep't 1974) (4-1 decision), *aff'g mem.* *Victorson v. Kaplan*, 75 Misc. 2d 429, 347 N.Y.S.2d 666 (Sup. Ct. Queens County 1973), *discussed in The Biannual Survey*, 48 St. JOHN'S L. REV. 611, 616 (1974). Along with *Victorson*, the Court affirmed *Brown v. 1580 St. John's Place, Inc.*, 44 App. Div. 2d 705, 354 N.Y.S.2d 689 (2d Dep't 1974) (mem.) (4-2 decision), as well as *Rivera v. Berkeley Super Wash, Inc.*, 44 App. Div. 2d 316, 354 N.Y.S.2d 654 (2d Dep't 1974) (3-2 decision), *discussed in The Survey*, 49 St. JOHN'S L. REV. 170, 172 (1974).

The Bock Laundry Machine Company manufactured and marketed a centrifuge extractor to spin water out of laundry before it was placed in a dryer. In all three cases, a safety lock failed to operate, causing injury to the plaintiff-users more than six years after the date of sale.

<sup>8</sup> 37 N.Y.2d at 399-400, 335 N.E.2d at 279, 373 N.Y.S.2d at 44-45. See CPLR 214(4), (5). By applying the tort rather than the contract statute of limitations, the Court has in yet another area treated what has become termed strict products liability as a tort. See, e.g., *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 436-37, 191 N.E.2d 81, 82-83, 240 N.Y.S.2d 592, 594-95 (1963) (4-3 decision) (breach of warranty "is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party"); *Rooney v. S.A. Healy Co.*, 20 N.Y.2d 42, 46-47, 228 N.E.2d 383, 386, 281 N.Y.S.2d 321, 325 (1967) (defective design actionable in breach of warranty despite sale as a used product); *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 124-25, 305 N.E.2d 750, 754, 350 N.Y.S.2d 617, 623 (1973) (disclaimer valid under the Uniform Commercial Code no defense to strict products liability claim). See also 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[5][g], at 3-367 (1975) (had the words "strict liability in tort" been used in *Goldberg* rather than the warranty concept employed, *Mendel* might have been decided differently).

<sup>9</sup> 37 N.Y.2d at 399, 335 N.E.2d at 278, 373 N.Y.S.2d at 43. The Court observed that most, although not all, claims for injury to person or property begin to run from the date of injury. *Id.* at 403, 335 N.E.2d at 278-79, 373 N.Y.S.2d at 44. See, e.g., *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969) (malpractice action for foreign object left in body is exception to rule and statute of limitations only begins to run from time of reasonable discovery), *discussed in The Quarterly Survey*, 45 St. JOHN'S L. REV. 500, 507 (1971); *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936) (tort action accrues upon injury); 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 40.01[2] (1975) (products liability cause of action should accrue only when defect is or should have been discovered); RESTATEMENT OF TORTS § 899, comment *c*, at 525 (1939) (limitation period does not usually begin to run until tort is complete). For a discussion of accrual of warranty actions, see *Harris v. Markin*, 256 App. Div. 907, 10 N.Y.S.2d 269 (1st Dep't 1939) (per curiam) (breach of implied warranty of authority to contract accrues when repudiated, not when discovered) and N.Y. U.C.C. § 2-725(2) (*McKinney* 1964) (if warranty extends to future performance, cause of action accrues when "breach is or should have been discovered" or at date of delivery).

<sup>10</sup> 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969) (4-3 decision), *criticized in Symposium on Mendel v. Pittsburgh Plate Glass Co.*, 45 St. JOHN'S L. REV. 62 (1970).

which had applied the then applicable contract statute of limitations and time of accrual, *i.e.* six years from the date of sale.<sup>11</sup>

The plaintiffs in *Victorson* would have been time-barred under the rule of *Mendel*. Only the adoption of a tort theory would make their actions timely. Judge Jones, writing for the Court, reasoned that since the parties had no prior relationship, the causes of action should accrue and the time within which to bring their actions should be established in accordance with negligence rather than contract principles.<sup>12</sup> Noting that the liability imposed on the manufacturer is based primarily on policy considerations,<sup>13</sup> the Court quoted an earlier decision to the effect that

"[a]ny Statute of Limitations reflects a policy that there must come a time after which fairness demands that a defendant should not be harried; the duration of the period is chosen with a balancing sense of fairness to the claimant that he shall not unreasonably be deprived of his right to assert his claim."<sup>14</sup>

Apparently, the Court of Appeals has become more concerned with the injured plaintiff's foreclosure from suit than with its previously expressed fear that "unfounded suits" might be brought years after the product left the manufacturer's plant.<sup>15</sup> The Court

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<sup>11</sup> 25 N.Y.2d at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494. The sales in *Victorson*, as in *Mendel*, were consummated prior to September 27, 1964, and therefore would be governed by a six-year limitation period under CPLR 213(2). Sales consummated after that date would be subject to a four-year period under N.Y. U.C.C. § 2-725(1) (McKinney 1964). CPLR 213(2) remains applicable, however, with regard to contracts other than those for the sale of goods.

Although the contract statute of limitations with regard to contracts for sale is often referred to as running from the date of sale, the correct phraseology is that the cause of action accrues "when tender of *delivery* is made." N.Y. U.C.C. § 2-725(2) (McKinney 1964) (emphasis added).

<sup>12</sup> 37 N.Y.2d at 403-04, 335 N.E.2d at 279, 373 N.Y.S.2d at 44.

<sup>13</sup> *Id.* at 401, 335 N.E.2d at 277, 373 N.Y.S.2d at 42. This social policy is predicated upon the presumption that the industry which markets the sophisticated products of today is best able to initially absorb the loss through insurance coverage, eventually passing it on to all consumers as part of the purchase price. The individual will usually buy the product without the knowledge necessary to examine it fully for defects. *Codling v. Paglia*, 32 N.Y.2d 330, 340-41, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 467-68 (1973); RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* (1965); *Bischoff, Comments on Mendel*, 45 ST. JOHN'S L. REV. 71, 74-75; *Murphy, supra* note 3, at 41.

<sup>14</sup> 37 N.Y.2d at 403, 335 N.E.2d at 279, 373 N.Y.S.2d at 44, *quoting* *Caffaro v. Trayna*, 35 N.Y.2d 245, 250, 319 N.E.2d 174, 176, 360 N.Y.S.2d 847, 850-51 (1974).

<sup>15</sup> In *Mendel* the Court stated:

We are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers *ad infinitum*.

25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.

The Court's change in emphasis since *Mendel* may be related to its change in composition. The two members of the present Court of Appeals who participated in the *Mendel* decision are Judge Breitel, now Chief Judge, who wrote the vigorous dissent therein and Judge Jasen, who, although a member of the *Mendel* majority, has seen fit to join a Court unanimous in handing down the *Victorson* decision.

posited that the lapse of time could be detrimental to both parties: impeding the manufacturer's capability to defend and hindering the plaintiff in his burden of proving that the product was defective as it left the hands of the manufacturer.<sup>16</sup> Additionally, a plaintiff would have to prove that such defect was the proximate cause of his injuries.<sup>17</sup>

Although initially observing that the plaintiffs in *Victorson* were remote users without any prior association with the defendant manufacturer,<sup>18</sup> Judge Jones by his sweeping rationale strongly suggests that the *Victorson* result will also be reached in strict products liability claims brought by purchasers. Acknowledging the consensus of authority to the effect that strict products liability "sounds in tort exclusively, and not at all in contract,"<sup>19</sup> Judge Jones, citing *Codling v. Paglia*,<sup>20</sup> declared that "the liability imposed on the manufacturer under strict products liability, whether it be to purchaser, user, or innocent bystander, is predicated largely on considerations of sound social policy."<sup>21</sup> The adoption of the tort

<sup>16</sup> 37 N.Y.2d at 404, 335 N.E.2d at 279, 373 N.Y.S.2d at 44. See, e.g., *Swain v. Boeing Airplane Co.*, 337 F.2d 940, 942 (2d Cir. 1964), cert. denied, 380 U.S. 951 (1965); PROSSER, *supra* note 6, § 103, at 674.

<sup>17</sup> See, e.g., *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 122, 305 N.E.2d 750, 752, 350 N.Y.S.2d 617, 621 (1973); *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 346, 351, 253 N.E.2d 207, 210, 213, 305 N.Y.S.2d 490, 495, 499 (1969) (Breitel, J., dissenting); Keeton, *Products Liability — Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855, 858 (1963); Murphy, *supra* note 3, at 42.

<sup>18</sup> 37 N.Y.2d at 399-400, 335 N.E.2d at 276, 373 N.Y.S.2d at 40. Characteristically, the Court has cautiously limited its decisions to the individual facts presented in developing the theory of strict products liability in New York. See *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 200, 173 N.E.2d 773, 775-76, 213 N.Y.S.2d 39, 42 (1961); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).

<sup>19</sup> 37 N.Y.2d at 402, 335 N.E.2d at 278, 373 N.Y.S.2d at 43, quoting Prosser, *Spectacular Change: Products Liability in General*, 36 J. CLEV. B. ASS'N 149, 168 (1965).

<sup>20</sup> 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).

<sup>21</sup> 37 N.Y.2d at 401, 335 N.E.2d at 277, 373 N.Y.S.2d at 42 (citation omitted) (emphasis added). The social policy involved is discussed in note 13 *supra*.

*Codling*, another opinion authored by Judge Jones, held that an "innocent bystander" may recover under a theory of strict products liability, 32 N.Y.2d at 335, 298 N.E.2d at 624, 345 N.Y.S.2d at 463, while at the same time holding that such theory would apply to any person if certain conditions were complied with, *id.* at 342, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70. Judge Jones stated:

We accordingly hold that, under a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injuries or damages; provided: (1) that at the time of the occurrence the product is being used . . . for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.

*Id.* (emphasis added). The cumulative effect of the broad language utilized in both *Codling* and *Victorson*, it is submitted, belies charges of mere obiter dicta.

theory, the rejection of the contract theory, and the underlying premise of "sound social policy" all militate in favor of a logical extension of *Victorson* to a purchaser's action in strict products liability,<sup>22</sup> thus affording him the tort statute of limitations and time of accrual.

Indeed, Judge Fuchsberg, in a concurring opinion, drew this implication from the majority opinion,<sup>23</sup> extending his discussion to consider the effect of the Uniform Commercial Code (UCC) on a consumer purchaser's action in strict products liability.<sup>24</sup> Judge Fuchsberg, relying on legislative cognizance and inaction in the face of judicial development of strict products liability, concluded that the UCC was not meant to preempt such an action.<sup>25</sup> Thus, as the UCC was not meant to preempt the development of strict products liability, neither should it abort the availability of a tort statute of limitations and time of accrual to a consumer purchaser.<sup>26</sup> Noting the exceptions made to the requirements of notice,<sup>27</sup> disclaimer,<sup>28</sup> and privity<sup>29</sup> in warranty actions brought by

<sup>22</sup> Cf. *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973), wherein the Court of Appeals affirmed the denial of defendant's motion for summary judgment in face of an action by a purchaser-plaintiff based on negligence, breach of warranty, and "strict liability in tort." But see *Codling v. Paglia*, 32 N.Y.2d 330, 345, 298 N.E.2d 622, 630, 345 N.Y.S.2d 461, 472 (1973) (Jasen, J., concurring) (majority opinion construed to "recognize a right of recovery in strict products liability for nonpurchasers and nonusers").

<sup>23</sup> 37 N.Y.2d at 405, 335 N.E.2d at 280, 373 N.Y.S.2d at 45 (Fuchsberg, J., concurring).

<sup>24</sup> *Id.* at 405-08, 335 N.E.2d at 280-82, 373 N.Y.S.2d at 45-48. See generally 1 WK&M ¶ 214.14a; Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 CASE W. RES. L. REV. 5 (1965); Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974).

<sup>25</sup> 37 N.Y.2d at 406, 335 N.E.2d at 280-81, 373 N.Y.S.2d at 46. Judge Fuchsberg's view is supported by a consideration of the following comments: N.Y. U.C.C. § 2-313, Comment 2 (McKinney 1964) (Code treatment of warranties not designed to disturb growing line of cases recognizing warranties "need not be confined either to sales contracts or to the direct parties to such a contract"); *id.* § 2-318, Comment 3 (Code does not intend "to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain"); *id.*, N.Y. Ann. at 317 (Code nowise "intended to limit the extension of warranty protection by the courts").

<sup>26</sup> Judge Fuchsberg stated that "the choice of the tort rule for all persons injured in such cases would . . . appear to partake of the virtues of simplicity and equality of application . . ." 37 N.Y.2d at 405, 335 N.E.2d at 280, 373 N.Y.S.2d at 45.

<sup>27</sup> N.Y. U.C.C. § 2-607, Comment 4 (McKinney 1964) (notification within a reasonable time is to be judged by different standards when applied to a retail consumer). See also *Silverstein v. R.H. Macy & Co.*, 266 App. Div. 5, 9, 40 N.Y.S.2d 916, 920 (1st Dep't 1943) (predecessor of § 2-607 held inapplicable to personal injury action and commencement of suit held sufficient notice).

<sup>28</sup> N.Y. U.C.C. § 2-316 (McKinney 1964) is much tempered by *id.* § 2-302 (unconscionability) and *id.* § 2-719(3) (personal injury disclaimer "prima facie unconscionable" with respect to "consumer goods"). See also *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973) (disclaimer between employer and manufacturer not applicable to employee in personal injury action); *Sarfati v. M.A. Hittner & Sons*,

consumers to recover for personal injuries, Judge Fuchsberg observed that if strict products liability had not evolved through decisional law as it did, the UCC itself might well have independently reached a similar result.<sup>30</sup> He also intimated that the exclusive application of the UCC in the context of time limitations be confined to commercial relationships.<sup>31</sup>

Also raised in *Victorson* is the question of whether a nonpurchaser's extended breach of warranty action has been merged into the strict products liability theory, thus depriving a nonpurchaser of an action governed by the contract statute of limitations and time of accrual. Notably, Judge Jones observed that "[d]epending on the factual context in which the claim arises,"<sup>32</sup> a plaintiff may frame his complaint in negligence, express warranty, implied warranty, or "some combination thereof."<sup>33</sup> Moreover, a choice of theories arguably does not flow from the case law development. In *Rivera v. Berkeley Super Wash, Inc.*,<sup>34</sup> one of three appellate division decisions affirmed in *Victorson*,<sup>35</sup> the second department, while establishing a tort limitation period for strict products liability,<sup>36</sup>

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35 App. Div. 2d 1004, 318 N.Y.S.2d 352 (2d Dep't 1970) (mem.), *aff'd mem.*, 30 N.Y.2d 613, 282 N.E.2d 126, 331 N.Y.S.2d 40 (1972) (disclaimer between lessor and manufacturer held unconscionable in action based upon lessor's liability for lessee's personal injuries); *Walsh v. Ford Motor Co.*, 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. Nassau County 1969) (disclaimer held prima facie unconscionable in personal injury action).

In *Victorson*, however, is an intimation that a disclaimer may be a valid defense to a personal injury action in some circumstances. See 37 N.Y.2d at 407 n.2, 335 N.E.2d at 281 n.2, 373 N.Y.S.2d at 47 n.2 (Fuchsberg, J., concurring) (*Velez* not inconsistent with extension of *Victorson* to consumer purchasers); *Velez v. Craine & Clark Lumber Corp.*, 33 N.Y.2d 117, 124-25, 305 N.E.2d 750, 754, 350 N.Y.S.2d 617, 623 (1973) (disclaimer may be valid under proper circumstances); *Winant v. Approved Ladder & Equip. Corp.*, 31 App. Div. 2d 965, 298 N.Y.S.2d 796 (2d Dep't 1969) (mem.), *aff'd mem.*, 28 N.Y.2d 529, 267 N.E.2d 885, 319 N.Y.S.2d 72 (1971) (disclaimer held valid against copartner in personal injury action); cf. N.Y. GEN. OBLIG. LAW §§ 5-322, -323, -325 (McKinney 1964), *as amended*, (McKinney Supp. 1975), invalidating exculpatory clauses as to negligence with regard to particular relationships.

<sup>29</sup> N.Y. U.C.C. § 2-318, Comment 3 (McKinney 1964), states that this section is not meant to interfere with the abandonment of the privity requirement in consumer cases. See also N.Y. U.C.C. § 2-318 (McKinney Supp. 1975), *amending* ch. 553, [1962] N.Y. Laws 2618, wherein a seller's warranty is extended to "any natural person," regardless of whether he is a member of the family or household or a guest. This amendment apparently attempts to bring the Code in line with case law developments in strict products liability, *viz* *Codling*.

<sup>30</sup> 37 N.Y.2d at 407, 335 N.E.2d at 281, 373 N.Y.S.2d at 47.

<sup>31</sup> *Id.* at 407-08, 335 N.E.2d at 281-82, 373 N.Y.S.2d at 48. See also N.Y. U.C.C. § 2-719(3) (McKinney 1964) (disclaimer with respect to personal injuries from consumer goods prima facie unconscionable, whereas disclaimer with respect to commercial loss valid).

<sup>32</sup> 37 N.Y.2d at 400, 335 N.E.2d at 277, 373 N.Y.S.2d at 41.

<sup>33</sup> *Id.*

<sup>34</sup> 44 App. Div. 2d 316, 354 N.Y.S.2d 654 (2d Dep't 1974), *discussed in* *The Survey*, 49 ST. JOHN'S L. REV. 170, 172 (1974).

<sup>35</sup> See note 7 *supra*.

<sup>36</sup> 44 App. Div. 2d at 325, 354 N.Y.S.2d at 663. Of course, the appellate division was constrained by the binding precedent of *Mendel. Id.* at 322, 354 N.Y.S.2d at 660.

stated that *Mendel* remains the law in terms of warranty actions.<sup>37</sup> The *Victorson* court, in affirming the applicability of the tort statute of limitations and time of accrual to a strict products liability claim, overruled *Mendel* only to the extent of its "contrary" holding.<sup>38</sup> Thus, *Mendel* apparently retains viability as to warranty claims. Yet, the Court's analysis of strict products liability indicates that the action is the end-growth of the extension of implied warranty to "plaintiffs who were neither buyers nor users of the product"<sup>39</sup> and that it is uniquely tortious in nature.<sup>40</sup> It is therefore possible that the courts may decide that the sole essence of the action brought is in fact tortious<sup>41</sup> and disregard any breach of warranty claim by a nonpurchaser.

Significant in this inquiry is that *Victorson* did not overrule *Blessington v. McCrory Stores Corp.*,<sup>42</sup> which had served as a basis for *Mendel*.<sup>43</sup> In *Blessington* the plaintiff's infant son died as a result of burns received when clothing purchased from the defendant retailer ignited. Despite the absence of privity the Court of Appeals allowed this survival action based on the theory of breach of implied warranty of fitness for use.<sup>44</sup> In addition, the Court, conferring the "benefit" of the longer contract statute of limitations,<sup>45</sup> in effect saved the claim from being dismissed as untimely, since the tort limitation period had already expired.<sup>46</sup> The *Mendel* Court followed the rule of *Blessington*, emphasizing the use of the word "benefit" therein, but with the result of depriving the plaintiff of an action which would have been timely under a tort statute of limitations.<sup>47</sup> In comparing *Blessington* with *Mendel*, Professor Siegel observed that the rule may have been consistent, but the result was not.<sup>48</sup>

In light of the *Victorson* Court's "sound social policy" approach in determining the appropriate statute of limitations,<sup>49</sup> it would

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<sup>37</sup> *Id.* at 326, 354 N.Y.S.2d at 663.

<sup>38</sup> 37 N.Y.2d at 400, 335 N.E.2d at 276, 373 N.Y.S.2d at 40.

<sup>39</sup> *Id.* at 401, 335 N.E.2d at 277, 373 N.Y.S.2d at 42.

<sup>40</sup> *Id.* at 402, 335 N.E.2d at 278, 373 N.Y.S.2d at 43; text accompanying note 19 *supra*.

<sup>41</sup> *Cf. Loehr v. East Side Omnibus Corp.*, 259 App. Div. 200, 18 N.Y.S.2d 529 (1st Dep't 1940), *aff'd*, 287 N.Y. 670, 39 N.E.2d 290 (1941) (mem.); *Hermes v. Westchester Racing Ass'n*, 213 App. Div. 147, 210 N.Y.S. 114 (1st Dep't 1925) (true nature of liability determines statute of limitations).

<sup>42</sup> 305 N.Y. 140, 111 N.E.2d 421 (1953).

<sup>43</sup> 25 N.Y.2d at 344, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.

<sup>44</sup> 305 N.Y. at 146-47, 111 N.E.2d at 422-23.

<sup>45</sup> *Id.* at 147, 111 N.E.2d at 423.

<sup>46</sup> *Id.* at 146, 111 N.E.2d at 422.

<sup>47</sup> 25 N.Y.2d at 343, 253 N.E.2d at 209, 305 N.Y.S.2d at 492.

<sup>48</sup> Siegel, *supra* note 5, at 67.

<sup>49</sup> See note 13 *supra*.



seem paradoxical to extend the "benefit" of a tort statute of limitations and time of accrual to save one nonpurchaser's claim and yet deny the "benefit" of a contract limitation period which may be necessary to save that of another. It is submitted that nonpurchasers should have the option of bringing their actions under an extended breach of warranty theory subject to the contract statute of limitations. As Professor Siegel indicated, *Blessington* should be an alternative route open to all plaintiffs.<sup>50</sup>

Apparently, the legislature has attempted to ensure the independent existence of a warranty action by amending section 2-318 of the UCC to extend warranties, whether express or implied, to "any natural person if it is reasonable to expect that such person may use, consume or be affected" by the defective product and he suffers injury thereby.<sup>51</sup> Exactly to whom this amendment extends coverage is not yet clear,<sup>52</sup> although it would appear that breach of warranty actions no longer need be "extended" to cover nonpurchasers. The courts, however, by noting the independence of actions under the Code from the case law development of strict products liability and by limiting the Code to situations "essentially" commercial,<sup>53</sup> have already set the stage for refusing to recognize this section's applicability to the consumer plaintiff. In terms of the manufacturer, this may be a just result, since otherwise, he will be subjected to two distinct limitation periods with respect to consumer claims.

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<sup>50</sup> Siegel, *supra* note 5, at 67. One of the lower court decisions affirmed by *Victorson* pointed out, however, that *Blessington* preceded the erosion of the "citadel of privity" and that the action therein was brought against an intermediary retailer rather than against the manufacturer. *Rivera v. Berkeley Super Wash, Inc.*, 44 App. Div. 2d 316, 323, 354 N.Y.S.2d 654, 660-61 (2d Dep't 1974), *aff'd*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975). Additionally, it must be noted that the *Blessington* situation may be explained by the "household goods" exception to the privity requirement for warranty actions which was subsequently established by the Court of Appeals. *See also* *Greenberg v. Lorenz*, 9 N.Y.2d 195, 199, 173 N.E.2d 773, 775, 213 N.Y.S.2d 39, 42 (1961), where the Court's rationale centered around the "injustice of denying damages to a child because of nonprivity."

<sup>51</sup> N.Y. U.C.C. § 2-318 (McKinney Supp. 1975), *amending* ch. 553, [1962] N.Y. Laws 2618.

<sup>52</sup> *See* Memorandum by Assemblyman Leonard Silverman in Support of A. 3070, ch. 774, § 1, 198th Sess. (1975) which indicates that, while the amendment was intended to extend warranty protection to all third parties, it was specifically aimed at the recipients of gifts.

<sup>53</sup> *See* notes 24-31 and accompanying text *supra*. *See also* *Rivera v. Berkeley Super Wash, Inc.*, 44 App. Div. 2d 316, 324, 354 N.Y.S.2d 654, 662 (2d Dep't 1974), *aff'd*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

Notably, Professor Prosser has stated:

Once the step has been taken of declaring that this is not a matter of warranty at all, and that the statute does not govern, it is difficult to see how any warranty provision in the Code can be controlling.

PROSSER, *supra* note 6, at 658 (citation omitted).

Although *Victorson* has resolved the controversy concerning the statute of limitations and time of accrual applicable to a remote user in a strict products liability action, the above discussion indicates the need for further clarification as to strict products liability. Such clarification can only be achieved by the legislature.<sup>54</sup> Until such time the practitioner seeking damages for injuries due to a defective product should plead his action alternatively on all possible theories of liability conceivably available.<sup>55</sup>

#### ARTICLE 9 — CLASS ACTIONS

*CPLR art. 9: Legislature adopts liberal class action statute.*

Article 9 of the CPLR, the new class action law,<sup>56</sup> promises to effect substantial changes in state litigation by opening judicial doors which heretofore have been virtually closed.<sup>57</sup> The new arti-

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<sup>54</sup> Recently, the legislature indicated its concern with facilitating the recovery of injured plaintiffs by making changes in related areas of the law. See note 51 and accompanying text *supra*.

Another recent legislative change is the enactment of comparative negligence in New York. CPLR 1411-13. The new law applies to causes of action accruing on or after September 1, 1975. *Id.* 1413. CPLR 1411 states that recovery for personal injury or property damage shall not be barred on account of contributory negligence. Contributory negligence is a broad term, however, and must be narrowed in its application to actions in strict products liability. See Murphy, *supra* note 3, at 42; Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 105, 119 (1972). A strict products liability action is subject to the following defenses: the product was being improperly used, a reasonable inspection by the user would have revealed the defect and its danger, or the plaintiff with reasonable care could have avoided his injuries. See note 21 *supra*. A reading of the new statute and its legislative history reveals that CPLR 1411 was intended to apply to actions based on strict products liability as well as breach of warranty when brought to recover for personal injury or property damage. See THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, comment (a), as appearing in [1975] N.Y. Laws 1483 (McKinney) regarding N.Y. GEN. OBLIG. LAW § 10-101 (subsequently enacted as art. 14-A of the CPLR); Memorandum from Stanley Fink to N.Y. Assembly, reprinted in 173 N.Y.L.J. 78, Apr. 23, 1975, at 7, col. 1. For a discussion of situations where comparative negligence should or should not be applied in strict products liability actions, see Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974).

<sup>55</sup> Additionally, the practitioner should be aware that the injured consumer plaintiff may be able to bring a cause of action in the federal district courts under the Consumer Product Safety Act §§ 2 *et seq.*, 15 U.S.C. §§ 2051 *et seq.* (Supp. III, 1973). If the defective product is covered by the Act and the plaintiff is injured as the result of a knowing or willful violation of a rule or order of the Consumer Product Safety Commission, he may recover damages sustained, costs, and, at the discretion of the court, reasonable attorney fees. The plaintiff, however, must satisfy the requisite \$10,000 amount in controversy. *Id.* § 23, 15 U.S.C. § 2072 (Supp. III, 1973), discussed in Note, *The Consumer Product Safety Act: A Federal Commitment to Product Safety*, 48 ST. JOHN'S L. REV. 126, 150-52 (1973).

<sup>56</sup> Ch. 207, § 1, [1975] N.Y. Laws 313 (McKinney), as amended, ch. 474, § 1, [1975] N.Y. Laws 713 (McKinney). The class action bill was signed by the Governor on June 17, 1975.

<sup>57</sup> See notes 61-63 and accompanying text *infra*.