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CPLR 214: Tort Statute of Limitations Adopted for Strict Products Liability

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portant, but, nevertheless, significant cases cannot be included. It is hoped that the *Survey* nonetheless accomplishes its basic purpose, *viz.*, to key the practitioner to significant developments in the procedural law of New York.

ARTICLE 1 — SHORT TITLE, APPLICABILITY AND DEFINITIONS

CPLR 105(j): Age of majority changed to eighteen.

The Legislature has added a new subdivision (j) to CPLR 105. This subdivision defines the words "infant" and "infancy" when used within the context of the CPLR. Under the new definitions, an infant is one who has not yet attained the age of eighteen.[1]

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 214: Tort statute of limitations adopted for strict products liability.

The scope of recovery for personal injury and property damage caused by a defective product has been greatly expanded since *MacPherson v. Buick Motor Co.*[2] eliminated the requirement of privity in negligence actions. Although this right of recovery predicated upon negligence is well settled, it may provide inadequate protection in certain instances.[3] Therefore, the New York Court of Appeals has seen fit

1 N.Y. SESS. LAWS [1974], ch. 924, § 1 (McKinney).

2 217 N.Y. 382, 111 N.E. 1050 (1916). *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

3 Recovery predicated upon a negligence theory may be had only if the following elements can be proven: (1) the plaintiff is within the category of persons to whom the manufacturer owes a duty of reasonable care, *see* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); (2) the manufacturer did not use such care; and (3) the negligently caused defect was the proximate cause of the plaintiff's injury. *See* W. PROSSER, LAW OF TORTS 143, 641 (Hornbook ed. 1971) [hereinafter cited as PROSSER]. The plaintiff may rely on res ipsa loquitur as an aid in proving negligence, but such proof may be difficult, or even impossible, particularly where a manufacturer can demonstrate that he generally used reasonable care throughout the manufacturing process. Wade, *On the Nature of Strict Tort Liability for Products*, 612 INS. L.J. 141, 142 (1974). *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) (per curiam) (plaintiff's suit dismissed in negligence but upheld on the theory of strict products liability); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), *discussed in The Quarterly Survey*, 48 ST. JOHN'S L. REV. 616 (1974) (jury found manufacturer free from negligence, but rendered verdict for the plaintiff on the theory of extended breach of warranty).

An even greater burden is imposed upon a plaintiff choosing, instead, to rely on the traditional cause of action for breach of warranty. He must prove: (1) contractual privity between himself and the seller; (2) the contract contained express or implied warranties not effectively disclaimed; (3) the defect causing the injury was a breach of the warranty; and (4) the defect proximately caused the injury. *See* N.Y.U.C.C. §§ 2-314, 2-315 (McKinney 1964). Broad disclaimers and adherence to privity requirements serve to limit the effectiveness of these Code provisions in protecting the consumer.

to afford greater protection to the public by extending the causes of action for breach of the implied warranties of merchantability and fitness for use beyond the traditional privity barrier.[4] While achieving necessary practical results, such attempts have resulted in much confusion[5] in the law of products liability since the extended breach of warranty action, though rooted historically in contract law, has evolved to the point where an injured party can recover despite the absence of any relationship whatsoever to the contract of sale.[6] Further confusion has resulted from the apparent similarities between the extended breach

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The extended breach of warranty action, though still developing, *see* note 6 *infra*, provides more effective redress. Unlike the actions in negligence and true breach of warranty, it eliminates the privity requirement and dispenses with the need to prove negligence.

The courts have extended the breach of warranty action in personal injury cases to the point where it is all but indistinguishable from strict products liability as to the elements of the cause of action. *See* note 25 *infra*; *see also* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). The crucial difference between the two actions is, however, that strict liability, if given all the concomitants of a tort action, can afford far greater advantages to a plaintiff. For example, in Rivera v. Berkeley Super Wash, Inc., 44 App. Div. 2d 316, 354 N.Y.S.2d 654 (2d Dep't 1974), *discussed in* notes 27-39 and accompanying text *infra*, the cause of action in extended breach of warranty was dismissed as time-barred under the contract statute of limitations, but the action in strict products liability was upheld under the tort statute.

[4] *See, e.g.*, Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

[5] The use of the extended breach of warranty action to compensate the public has been characterized as replete with "undesirable complications, and . . . more trouble than it is worth." PROSSER, *supra* note 2, at 658.

[6] Until relatively modern times, the New York Court of Appeals had required privity of contract to maintain an action for breach of warranty. *See* Turner v. Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923). The first major breakthrough came with Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961), which extended the seller's warranty on consumer goods to cover all members of the purchaser's household. This decision was later embodied in section 2-318 of the Uniform Commercial Code (UCC). The Court in Goldberg v. Kollsman Instruments Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), allowed recovery for wrongful death against the manufacturer of an airplane but not against the manufacturer of the defective component which had caused the accident. By allowing the action on behalf of a passenger, the Court thus extended breach of warranty protection to all foreseeable users. *See also* Rooney v. S.A. Healy Co., 20 N.Y.2d 42, 228 N.E.2d 583, 281 N.Y.S.2d 321 (1967); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953). Later, the Court sustained recovery by a rescuer of a person endangered by a defective product on the tort doctrine that "danger invites rescue." The Court stated that the doctrine applies where one, by his culpable act, has placed another in a position of peril, whether the act be characterized as negligence or breach of warranty. Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 464, 255 N.E.2d 173, 175, 306 N.Y.S.2d 942, 944-45 (1969). Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), has been interpreted even by those advocating its narrowest construction to expand breach of warranty to include bystanders. *See* note 18 *infra*.

It is now well settled, therefore, that breach of warranty has no privity requirement in personal injury actions. The injured plaintiff need not have any relationship whatsoever to the contract of sale, and need not allege a contract as part of his cause of action.

of warranty action, sounding in contract, and the action of strict products liability, sounding in tort.

In its traditional form, a warranty is a "statement or representation made by the seller of goods, contemporaneously with and as part of the contract of sale, though collateral to the express object of it, having reference to the character, quality, or title of the goods . . . ."[7] The measure of damages obtainable in a contract action for breach of warranty is the difference between the value of the goods as accepted and their value had they been as represented.[8] Consequential damages, including injury to person or property resulting from the breach, are governed by contract law and, accordingly, are relegated to a secondary status.[9]

The extended breach of warranty action,[10] a hybrid of tort and contract law, is sufficiently removed from contract law concepts to make use of the term "warranty" misleading. A contract of sale is unnecessary, the legal fiction of implied warranty supplying the premise upon which a suit for breach is based.[11] In utilizing this cause of action, the Court of Appeals has been inconsistent in its application of proper legal principles. While sustaining warranty actions for wrongful death[12] and recovery by a rescuer,[13] both grounded in tort, the Court has applied contractual principles in determining that the statute of limitations begins to run from the time of sale.[14] Since no persuasive reason exists to explain such seemingly varied results, uniformly applicable guidelines are

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7 BLACK'S LAW DICTIONARY 1758 (rev. 4th ed. 1968).

8 N.Y.U.C.C. § 2-714(2) (McKinney 1964).

9 The common law rule of contract damages, first announced in Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854), is that damages are limited to those ordinarily and naturally arising from the breach and in the contemplation of the parties at the time the contract was made. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 206 (1970). Where applicable, the remedy provided by the Uniform Commercial Code is somewhat broader. *See, e.g.*, N.Y.U.C.C. § 2-715 (McKinney 1964).

10 Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), may represent the culmination of the extended breach of warranty action in New York if strict products liability has, in fact, been adopted. *See* notes 20-26 and accompanying text *infra*. The future of the extended breach of warranty action may be limited to situations involving commercial loss as in Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (recovery allowed by an indirect purchaser of textiles treated with defendant's chemicals who relied on the latter's representations that the material would not shrink, thereby suffering pecuniary loss).

11 *See* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

12 *Id.*; Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953).

13 Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969).

14 Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), *discussed in Symposium on Mendel v. Pittsburgh Plate Glass Company*, 45 ST. JOHN'S L. REV. 62 (1970).

needed by the courts and the parties in instances where tort and contract rules apparently overlap.

Strict products liability, also known as "enterprise liability," is a parallel theory of recovery which directly recognizes the policy underlying the extended breach of warranty action, *viz.*, to place the risk of injury resulting from a defective product upon the industry which markets it rather than upon the hapless victim. The industry, regardless of fault, is thought to stand in a better position to absorb the loss and spread its cost over the general public benefitting from the availability of the product.[15] By dispensing with the legal fictions and conceptual inconsistencies surrounding extended breach of warranty, strict products liability achieves the goal first announced in 1912 that "the remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."[16]

Since the extended breach of warranty action is a contract-tort hybrid, and strict products liability pure tort,[17] the distinction between the two is often muddled. This is especially true since both seek to protect the public without making the manufacturer an insurer. Consequently, it has been asserted that strict products liability is merely the final development of the extended breach of warranty action, the last "vestiges of contract" having been removed.[18] Unhappily, the similarities have, in the past, led the Court of Appeals to refer to "strict liability in tort and implied warranty in the absence of privity as merely different ways of describing the very same cause of action."[19]

The Court of Appeals attempted to clarify the law of products liability in *Codling v. Paglia.*[20] There, the Court promulgated several requirements which, if satisfied, would allow anyone injured by a defective product to recover.[21] Because the Court did not expressly denomin-

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15 *See* Murphy, *New Directions in Products Liability*, 612 INS. L.J. 40, 41 (1974) [hereinafter cited as Murphy].

16 Ketterer v. Armour & Co., 200 F. 322, 323 (S.D.N.Y. 1912); *accord*, PROSSER, *supra* note 3, at 656.

17 *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *b* at 349 (1965).

18 Murphy, *supra* note 15, at 45. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *b* at 348-49 (1965); PROSSER, *supra* note 3, at 658; Comment, *Strict Products Liability—Its Application and Meaning*, 21 SW. L.J. 629 (1967).

19 Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 345, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 494 (1969).

20 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

21 The Court 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 injury or damages; provided: (1) that at the time of the occurrence the product is being used . . . in the

ate its formula one of strict liability in tort, the question of whether *Codling* intended to create such an independent cause of action in New York or intended merely to refine existing warranty law has been subject to conflicting interpretation.[22] The better view of *Codling* is that it recognized a separate cause of action in tort, labelled strict products liability.[23] A comparison of the *Codling* test with that formulated by the *Restatement (Second) of Torts*[24] for strict liability in tort would

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manner normally intended, (2) that if the person injured . . . is himself the user . . . 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 . . . would not otherwise have averted his injury or damages.

Id. at 342, 298 N.E.2d at 628-29, 345 N.Y.S.2d at 469-70.

22 The Court of Appeals in *Codling* did not emphatically declare that strict products liability is now a separate cause of action in New York. The holding of the case, however, necessarily adopts the strict products liability elements, *see* note 25 *infra*, but leaves open the more important question of whether or not the *Codling* action is pure tort or still partly rooted in contract. In so doing, the Court followed a long established, if seldom articulated, policy of progressing reticently in the products liability area. *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) ("However, for the present at least we do not think it necessary to so extend this rule . . . ."); Greenberg v. Lorenz, 9 N.Y.2d 195, 200, 173 N.E.2d 773, 775-76, 213 N.Y.S.2d 39, 42 (1961) ("So convincing a showing . . . calls upon us to move but we should be cautious and take one step at a time."); MacPherson v. Buick Motor Co., 217 N.Y. 383, 389, 111 N.E. 1050, 1053 (1916) ("This is as far as we are required to go for the decision of this case.").

23 Indeed, the very same Court which decided *Codling*, six months later declared that "strict product liability sounds in tort rather than in contract." 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) (per curiam). In *Velez*, the plaintiffs were injured when a rotten scaffold plank sold to their employer by the defendant gave way under their weight. The plaintiffs proceeded against the defendant lumber company on the theories of negligence and extended breach of warranty. A claim based upon a theory of strict products liability, however, was not asserted, as *Codling v. Paglia* was not decided until the case reached the appellate level. The negligence count was dismissed at the close of the case. The jury found for the plaintiffs on the breach of warranty count. On appeal, the defendant contended that the plaintiffs' action was barred by the disclaimer running from the defendant to the plaintiffs' employer. The Court held, on tort principles, that even though a disclaimer of tort liability may be valid between contracting parties, it cannot bind strangers thereto. The case was, however, remanded because the lower court's jury instructions were defective in light of *Codling* in that the jury had not been instructed that the plaintiffs could recover only if, as users, they had used reasonable care to discover the defect and were unable to prevent their injuries by the use of reasonable care.

24 The *Restatement* provides as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
  (a) the seller is engaged in the business of selling such a product, and
  (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
  (a) the seller has exercised all possible care in the preparation and sale of his product, and
  (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

support this conclusion.[25] Yet, argument may still be made that *Codling* merely extended the breach of warranty action to bystanders without creating a new cause of action.[26] Therefore, the question whether to apply contract or tort principles under these circumstances has continued to pose problems.

The Appellate Division, Second Department, in *Rivera v. Berkeley Super Wash, Inc.*,[27] recently adopted the position that *Codling* did, in fact, recognize strict products liability as a separate cause of action. There, injury occurred in 1967 when a safety lock on the hatch of an extractor, a centrifugal laundry machine, failed to operate. The plaintiff, a small boy, lost his arm as a result of injuries sustained when he reached into the rotating machine. The defendant had sold the extractor in 1959, eight years prior to the accident. In the action, commenced in 1967, the complaint was initially grounded in negligence but was later amended to include an action for breach of warranty. The trial court denied defendant's motion for summary judgment on the breach of warranty action and granted plaintiff's request to further amend his complaint to include a third cause of action in strict products liability.[28]

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25 The following table illustrates a comparison of both tests:

	Restatement	*Codling v. Paglia*
When defective	time of sale	implies the same
Extent of defect	"unreasonably dangerous to user or consumer"	"a substantial factor in bringing about his [any person's] injury or damage."
Manner of use	ordinary and normal manner	same suggested
Contributory negligence	not a defense	a limited defense, in that there is a duty on user (but not a bystander) to use reasonable care to discover defect
Assumption of risk	defeats recovery	defeats recovery if by reasonable care injury could have been averted
Proper defendant	seller	manufacturer

The *Restatement* clearly provides that the defect must exist at the time of sale. The Court of Appeals, in *Codling*, although ambiguous as to the time of the existence of such defect, eliminated the possibility of a contrary inference by stating that "[t]he jury properly found that Chrysler had *produced* an automobile with a defective steering mechanism . . . ." 32 N.Y.2d at 342-43, 298 N.E.2d at 629, 345 N.Y.S.2d at 470 (emphasis added).

While it has often been said that contributory negligence cannot be a defense to a strict liability action, certain forms of contributory negligence will bar recovery. *See* Murphy, *supra* note 15, at 42.

26 *See* notes 18 & 19 *supra*.

27 44 App. Div. 2d 316, 354 N.Y.S.2d 654 (2d Dep't 1974).

28 *Id.* at 318-19, 354 N.Y.S.2d at 656-57.

On appeal, the question was whether to apply the tort or contract statute of limitations to the second and third causes of action. The contract statute, six years under the CPLR,[29] runs from the time of sale. Applied in *Rivera*, the defendant's liability in warranty would have expired two years prior to the accident. The tort statute of limitations, three years under the CPLR,[30] accrues at the time of the injury regardless of the date of sale of the defective product. Application of the tort statute in *Rivera*, urged upon the court by the plaintiff, would have made the action timely. Although the court dismissed the cause of action in warranty as time-barred by contract rules, it found plaintiff's argument persuasive and upheld the separate cause of action in strict products liability as timely under tort principles.

The defendant had relied upon *Mendel v. Pittsburgh Plate Glass Co.*,[31] which applied the contract statute of limitations to an extended breach of warranty action. In so doing, the *Mendel* Court explicitly refused to recognize strict products liability as a separate cause of action.[32] The Court found that the wording of the Uniform Commercial Code (UCC) bound a contracting party to the sales statute of limitations regardless of the type of injury sustained. As a result, it was thought inappropriate to allow a stranger to the contract to enjoy a more favorable statute of limitations than a contracting party. Additionally, *Mendel* deemed *Blessington v. McCrory Stores Corp.*[33] controlling. In *Blessington*, the Court granted plaintiffs the benefit of the longer contract statute of limitations after their cause in negligence had expired. The *Mendel* Court applied the same rationale despite the fact that imposing the contract statute therein served to defeat an otherwise bona fide claim.

Acting Presiding Justice Shapiro, writing for the majority in *Rivera*, rejected the contention that there existed no separate cause of action in strict products liability. The court distinguished the strict

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29 CPLR 213. Under the Uniform Commercial Code, the statute of limitations governing sales is now four years. N.Y.U.C.C. § 2-725 (McKinney 1964). However, this section applies prospectively only to sales made after September 27, 1964, and, therefore, did not apply in *Rivera*.

30 CPLR 214.

31 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969). In *Mendel*, the plaintiff was injured when struck by a glass door seven years after the defendant manufacturer had installed it. The plaintiff alleged negligence and breach of implied warranties. The cause of action in warranty was dismissed. The dismissal was affirmed by the Court of Appeals on the ground that the warranty action was barred by the contract statute of limitations.

32 *Id.* at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494. *See* text accompanying note 18 *supra*.

33 305 N.Y. 140, 111 N.E.2d 421 (1953).

products liability action, sounding in tort, from breach of warranty under the UCC. The court felt the latter action was relevant only to "the genuine breach of contract situation involving buyer and seller . . . ."[34] In concluding that "on the operative facts in this record, *Mendel* is no longer viable,"[35] the Second Department limited *Mendel* to the extended breach of warranty cause of action.

In so holding, the *Rivera* court took issue with *Mendel's* interpretation of the UCC and its construction of *Blessington*. While *Mendel* found that the UCC statute of limitations[36] was determinative, *Rivera*, relying on language in the comments to another section of the Code[37] and on the absence of directly controlling language in the Code itself, took exception to the position that the UCC was intended to be an exclusive remedy for products liability. In fact, the court found that the UCC statute of limitations was, by its language, specifically directed at the contract of sale, not at the collateral area of products liability in tort.[38] Furthermore, the court rejected the argument, asserted in *Mendel*, that policy demanded application of the contract statute of limitations to protect the manufacturer. The *Rivera* court noted that a cause of action in negligence had always accrued at the time of injury and that no undue hardship had resulted.[39] Finally, the court supported its decision by stating:

> It is clearly unjust to deny an injured party the possibility of compensation on the wholly arbitrary basis of a lapse of a period of time, the inception of which period of time is in no way connected with him and the passage of which bears no relation to any laches on his part.[40]

The court, having determined that the *Codling*-created action of strict products liability was essentially one in tort, thus invested it with

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34 44 App. Div. 2d at 324, 354 N.Y.S.2d at 662.

35 *Id.* at 332, 354 N.Y.S.2d at 660. *See also* Jerry v. Borden Co., 45 App. Div. 2d 344, 358 N.Y.S.2d 426 (2d Dep't 1974).

36 Section 2-725(2) states "a cause accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." N.Y.U.C.C. § 2-725(2) (McKinney 1964).

37 Comment 2 to section 2-318 of the UCC expressly states this section extends the seller's warranty, express or implied, to all members of the buyer's household and does not exclude any cause of action in negligence. N.Y.U.C.C. § 2-318, comment 2 (McKinney 1964). Additionally, comment 3 states that this section "is not intended to enlarge or restrict" the extent to which the developing case law applies the seller's warranty to other persons. *Id.* at comment 3.

38 44 App. Div. 2d at 324, 354 N.Y.S.2d at 662.

39 *Id.* at 324, 354 N.Y.S.2d at 661.

40 *Id.* at 325, 354 N.Y.S.2d at 662. The court here echoes the words of Judge (now Chief Judge) Breitel, dissenting in *Mendel*: "[I]t is all but unthinkable that a person should be time-barred from prosecuting a cause of action before he ever had one." 25 N.Y.2d at 346, 253 N.E.2d at 211, 305 N.Y.S.2d at 495.

a concomitant of the tort action — the personal injury statute of limitations. Accordingly, plaintiff's action in strict products liability was upheld as timely, having been commenced within three years of the injury.[41] The action for breach of warranty, however, was dismissed on the ground that *Mendel* was still controlling authority for this action until the Court of Appeals ruled otherwise.

It is anticipated that the Court of Appeals will consider *Rivera* in the near future, and, by affirmance, solidify its adoption of strict products liability.[42] In situations similar to *Rivera*, where the sale has occurred years before, or *Codling*, where the jury finds a defect but an absence of negligence, the need is clearly demonstrated for an alternative cause of action in strict products liability. *Rivera* presents an ideal opportunity for the Court of Appeals to lend much-needed clarity to this area of the law.

CPLR 214(6): Cause of action for professional malpractice held to accrue no later than the time of termination of parties' professional relationship.

Generally, a cause of action for malpractice accrues at the time of the wrongful acts or omissions of the professional.[43] Applying this rule, the Appellate Division, Second Department, in *Sosnow v. Paul*,[44] dismissed a complaint for malpractice filed against two architects after the three-year statute of limitations set forth in CPLR 214(6) had expired. The dismissal resulted despite the apparent inability of the nonprofessional plaintiff to discover the negligence until the action was time-barred.

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41 Two judges dissented on the ground that *Codling* had not established a new cause of action for strict liability and thus, they felt, *Mendel* was directly applicable. 44 App. Div. 2d at 326-29, 354 N.Y.S.2d at 664-67.

42 Chief Judge Breitel, as evidenced by his dissent in *Mendel*, 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495, has long been an advocate of the recognition of strict products liability in tort.

43 *See, e.g.*, Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963); Gilbert Properties, Inc. v. Millstein, 40 App. Div. 2d 100, 338 N.Y.S.2d 370 (1st Dep't 1972); Seger v. Cornwell, 44 Misc. 2d 994, 255 N.Y.S.2d 744 (Sup. Ct. Albany County 1964).

Two exceptions to this rule exist. Where the negligence charged involves the leaving of a foreign object in the body of a patient by a physician, the action does not accrue until the patient could reasonably have discovered the injury. *See* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 508 (1971). In addition, Borgia v. City of New York, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962), established the continuous treatment doctrine, whereby the accrual of a malpractice cause of action is delayed until the services of the physician for the same or related injuries terminate. *Accord*, O'Laughlin v. Salamanca Hosp. Dist. Authority, 36 App. Div. 2d 51, 319 N.Y.S.2d 128 (4th Dep't 1971).

44 43 App. Div. 2d 978, 352 N.Y.S.2d 502 (2d Dep't 1974).